THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil Action No.**
	)	**96-1285 (RCL)**
GALE A. NORTON	)	
SECRETARY OF THE INTERIOR, et al.	)	
	)	
Defendants	)	
	)	
	)	

FIRST REPORT OF THE COURT MONITOR

I. INTRODUCTION

In its decision, *Cobell v. Norton, 91 F. Supp 2d 1 (D.D.C. 1999)*, this Court concluded that the Department of the Interior (DOI) owed plaintiffs, the Indian Trust Account Holders and Trust beneficiaries, an accounting. Specifically, "**an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited."** *Id*. at 58.

Further, this Court ruled that DOI had a duty to render an historical accounting and that the Indian Trust Fund Management Reform Act, Pub. L. No. 103-412 (1994) (1994 Act), had placed the duty upon the Secretary of Interior "**to account for the daily and annual balance of all funds held in trust by the United States for the benefit of...an individual Indian pursuant to the Act of June 24, 1938**" *Id.* at 39.

To render that historical accounting, the Court directed the Interior defendants "**to retrieve and retain all information concerning the IIM trust**" and "**to establish written policies and procedures for collecting from outside sources missing information that is necessary to render an accurate accounting."** *Id.* at 42.

The Court, while establishing the scope of the accounting, left it to the Interior defendants to determine the "specific form" of the historical accounting. *Id.*, fn 32 at 40.

By Order of April 16, 2001, the Court appointed the Court Monitor to review and monitor "**all of the Interior defendants' trust reform activities and file written reports of his findings with the Court."** *Id*. at 1. The Court Monitor divided the review and monitoring of DOI's trust reform activities into two phases:

1) the DOI's preparation for and conduct of an historical accounting;

2) the remedial actions regarding prospective trust operations taken to "ensure proper discharge of the trust responsibilities of the United States." 25 U.S.C. at 162a(d). This has been termed "fixing the system" and includes ensuring that the Interior defendants can provide trust responsibilities such as outlined in the 1994 Act including :

- adequate systems for accounting for and reporting trust fund balances;
- providing adequate controls over receipts and disbursements;
- providing periodic, timely reconciliations to assure the accuracy of accounts;
- preparing and supplying ... periodic statements of ... account performance" and balances to account holders;
- establishing consistent, written policies and procedures for trust fund management and accounting.

No prospective Indian Trust accounting responsibilities pursuant to the 1994 Act's requirements can be accomplished unless an accurate historical accounting is timely completed to provide the balances on which to base any future accountings for trust beneficiaries. Therefore, the Court Monitor's first review was directed at what has been done by the Interior defendants to render this court-ordered historical accounting.

The initial historical accounting review began with interviews of the senior management of the Department of the Interior (DOI) and a review of the public and DOI internal documents supplied to or located by the Court Monitor. Within several weeks of the review, it became apparent that there had been a great deal of activity by DOI officials regarding responding to the court's December 1999 order for an historical accounting. But the status of the actual accounting, with few exceptions, was, for lack of a better term, at ground zero.

While a Senior Executive Service-level project manager had been brought on board in March 2001, he was in the early stages of putting together a staff and preparing to hire an outside statistical expert to begin the historical accounting project. The proposed historical accounting was described as a statistical sampling of a limited number of IIM; perhaps as few as 350 accounts.

Discussions with those officials having involvement in or responsibility for the historical accounting project did not provide an explanation of why there had been a one and one-half year hiatus between beginning the process to determine the method of accounting and the first steps to do an accounting. DOI officials were unable to explain the decision-making process that went in-to the decision to do a statistical sampling project or explain what were the project's parameters. Some officials believed they were to do a complete statistical sampling historical accounting. Others thought the project was no more than a "pilot" project to determine the feasibility of this method of reconciliation of IIM accounts. There were no time parameters for the project and no real estimates of the cost. Initial discussions with the Special Trustee, who had been given the responsibility for accomplishing the historical accounting did not clarify why it was limited to a statistical sampling of perhaps no more than 350 IIM account holder records.

The confusion about and ignorance of the project's purpose and approach also cast some doubt on the overall decision process to do a statistical sampling; the decision of the former Secretary of the Interior (Secretary) to approve the statistical sampling project, and the decision of the present Secretary affirming that decision. This also called into question the legitimacy of the project itself.

The Court Monitor's review was therefore changed. It was not begun to determine the status of the Interior defendants' preparation for and conduct of the historical accounting - - there was no project in progress other than in the most primitive stages - - but to determine the reasons for the year and one-half delay in beginning an historical accounting pursuant to this court's order and in light of the representations made by the Interior defendants to this court, the Court of Appeals, and to the IIM account holders.

The following review of the history of the DOI decision-making process is divided into three parts. First, a review of the public and internal records establishing the factual background relied on by the Court Monitor to base his initial interviews of DOI officials and others. Second, a factual review and analysis of those events surrounding the historical accounting decision-making process as elicited from interviews with the participants. Third, the Court Monitor's discussion and conclusions. Finally, remarks regarding the results of the present and past administrations' actions.

II. FACTUAL REVIEW AND ANALYSIS

A. Public Record Documents

This portion of the report deals with information contained in those public records that were made available to the Court Monitor. These served, in part, as the basis for his initial review and monitoring activities regarding the Interior defendants' actions to provide an historical accounting were based.

Soon after this Court's December 21, 1999 ruling, the Interior defendants notified both this Court and the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) of their intentions regarding the historical accounting.

On January 5, 2000, the Interior defendants filed with the Court of Appeals a "Corrected Petition for Permission to Appeal Pursuant to 28 U.S. C. Sec. 1292(b)." In that petition, defendants asked for the right to appeal based in part on the argument that the district court's imposition of "new duties" (i.e.; an historical accounting and related records location and retention) contravened the limits of its authority under the APA and ignored that Congress gave Interior and not the courts the authority to flesh out the general contours of the 1994 Act, i*d.* at 19. Defendants argued that this court went too far in determining a key parameter of the accounting - - that it must be completed without regard to when the funds were deposited, *id.* at 17. Counsel for the Interior defendants also noted at page 13 that:

"In addition, we have been informed by Interior that it will implement a process under the APA to meet its remaining obligations regarding reconciliation and accounting, including interpretation of the Act to specify in greater detail the nature and scope of these obligations and determination of

reasonable and appropriate methods to meet them. That process will include consultation with Indian Tribes, an opportunity for comment by account beneficiaries and the public, and will commence with a notice published in the Federal Register on or before March 1, 2000"

On March 1, 2000, the Interior defendants filed their appellate brief and the draft Federal Register notice with this Court as exhibits to a "Motion for Entry of an Order Regarding a Public Administrative Process to Implement The American Indian Trust Fund Management Reform Act of 1994." They stated that they sought to initiate an administrative process "to comply with Congressional directives to determine the most reasonable methods for providing accountholders with information to evaluate their accounts and determine whether there are discrepancies due to past management practices," *id.* at 6-7. They went on to state that because Congress did not specify the nature of the reconciliation "DOI will pursue the administrative process described in the Proposed Notice to assist DOI in fulfilling its statutory responsibilities." *Id*.

The draft Federal Register notice's Summary stated in part:

"As directed by Congress, the Department is continuing development of a reconciliation process to evaluate the reliability of past account activity. This notice initiates an information gathering process with IIM account beneficiaries, and the public, to comply with Congressional directives to determine the most reasonable methods for providing accountholders with information to evaluate their accounts and to determine whether there are discrepancies due to past management practices." *Id.* at 1.

And further, at page 16, under Section III, Factors to Consider in Evaluating Options:

"Although the Department intends to consider the widest possible range of options for meeting the goals stated above, the Department will be guided by a number of factors in evaluating the reasonableness of each option."

The Federal Register notice went on to outline the options and the possible monetary and other consequences of the choices available. These included options such as transaction-by-transaction reconciliation; limited reconciliation; sampling; analysis of current account data; and a payment formula or "rough justice" payment.

This Court, in its "Order Regarding A Public Administrative Process To Implement The American Indian Trust Fund Management Reform Act of 1994" granted the Interior defendants' motion on March 28, 2000 over plaintiffs' objection, among others, that the Notice was an artifice to delay the historical accounting the Court had required. Plaintiffs argued that the rulemaking process begun with the notice would allow the Interior defendants to delay the type of historical accounting they already knew they had to do. The Court made no ruling at the time "on any other legal question presented by the Proposed Notice." *Id.*

The Federal Register notice was published on April 3, 2000. The initial dates for the public meetings established in the Notice (April 24 through May 6, 2000) were not adjusted even though the Notice was delayed by over one month.

On March 27, 2000, "Defendants' Motion For Partial Summary Judgment on Plaintiffs' Claims For An Historical Accounting of IIM Accounts" was filed with this Court. Once again, the filing

of the Federal Register notice was raised in argument in support of the Interior defendants' position that either the Court of Appeals or this Court should reject plaintiffs' call for an "all funds" historical accounting.

In their "Memorandum In Support of Defendants' Motion for Partial Summary Judgment on Plaintiffs' Claims For an Historical Accounting of IIM Accounts" accompanying the Motion, at page 2, the defendants again quoted their argument before the Court of Appeals stating that:

"(w)here the responsible agency has not yet addressed issues regarding the scope and methods of reconciliation and accounting to IIM account holders as required by the 1994 Act, does the APA permit a court to declare, in the first instance, that the 1994 Act requires defendants to provide plaintiffs with an accurate accounting of all money in the IIM trust 'without regard to when funds were deposited...."

The Interior defendants cited to this argument and the recent motion to begin the Federal Register notice administrative process under the APA and argued:

"These two developments put a sharp focus on one of the central issues of Phase II - the extent to which this Court can define the scope of Interior's obligation to analyze historical transactions before the agency has done so. Defendants maintain, as is set out in the Petition for Permission to Appeal (Exhibit 1), that the agency must be allowed, in the first instance, to determine matters regarding the scope of the 1994 Reform Act, including the role an historical analysis should play in its full implementation." *Id.*

Progress on the Federal Register notice was highlighted for the Court of Appeals in the "Opening Brief For Appellants" filed May 24, 2000:

"Therefore, after ensuring that implementation of the prospective reforms was well underway, Interior recently has begun a process of examining how and to what extent to reconcile transactions within the IIM trust which occurred prior to 1994, and has begun seeking appropriations for this administrative undertaking. See 65 Fed. Reg. 17521-02 (Apr. 3, 2000)." *Id.* at 17.

Later is their brief, they used the start of this Federal Register notice process in support of their argument:

"Since the scope and nature of an administrative accounting has yet to be resolved, let alone implemented, the plaintiffs' recourse is an APA action seeking to compel agency action unlawfully withheld or unreasonably delayed...." *Id.*. at 59.

"Just as Congress expected, Interior has proceeded by first developing new accounting systems (TFAS and TAAMS), engaging in extensive data cleanup efforts, and regularizing procedures. These efforts are designed to assure that the agency will be able to prospectively fulfill its responsibilities to account holders, and also lay the foundation for an historical reconciliation. *The historical effort has recently been initiated by a Federal Register notice announcement."* *Id.* at 59-60 (footnote citing to Federal Register omitted, emphasis added).

B. Other Relevant Public and Internal DOI Documents

Additional relevant public and DOI internal documents reviewed by the Court Monitor regarding the activities of the Interior defendants displayed in a chronological order provide a somewhat disjointed picture of the Federal Register notice information gathering process and Secretary of the Interior Bruce Babbitt's subsequent decision on a method to accomplish the requisite historical accounting. For instance, nothing more was heard of the Federal Register notice process until September 2000.

On September 7, 2000, The Assistant Secretary for Policy, Management, and Budget (PMB), Department of Interior, John Berry, sent a letter to the Chairman of the House Subcommittee on Interior and Related Agencies and the same letter to the Chairman of the Senate counterpart committee notifying them that the Office of Management and Budget has approved a $27.6 million FY 2001 budget amendment to address additional trust reform needs (**Tab 1**). A $10.0 million component of this budget amendment was for "(c)osts associated with Individual Indian Money (IIM) accounting." *Id.* at 1. The following statement was made in the body of the letter at page 3:

"The Department published a Federal Register Notice on April 3, 2000, inviting comments on the most reasonable methods for providing accountholders with information to evaluate their accounts and to determine whether there are discrepancies due to past management practices. The Department can reasonably assume that the costs to publish at least two additional Federal Register notices related to the proposed plan and a final rule will be $500,000 each. The Department is also funding a small pilot study to ascertain the validity and results of a sampling methodology that has been developed for the second trial. The goal of the pilot study is to determine if it would have broad applicability for providing the historical accounting called for in the 1994 American Indian Trust Fund Management Reform Act and described in the April 3, 2000 Federal Register Notice. ***While the full costs associated with carrying out an IIM accounting are difficult to estimate, we believe that $9.0 million is needed to begin the statistical sampling and related efforts.*** **Therefore, a total of $10 million is likely to be needed in FY 2001."** Emphasis added.

Three weeks later, on September 29, 2000, a Congressional Conference report (**Tab 2**) was published providing $27,600,000 for Federal Trust programs. In discussing this appropriation, the Committee noted, at page 150, that:

"The Department of Interior has announced its intention to explore the use of sampling as the best, most cost effective approach to provide an accounting for IIM beneficiaries. **While the Indian Trust Reform Act contemplated that such an accounting would sometime occur, the managers have been concerned for years about the potential cost and effectiveness of any approach that might be used. After investing $20 million over five years in a tribal account reconciliation process, there has been no resolution of issues surrounding tribal accounts. The cost of a similar accounting for the approximately three hundred thousand IIM account holders could conceivably cost hundreds of millions of dollars.**

Therefore while approving the request to begin an IIM sampling approach, the managers direct the Department to develop a detailed plan for the sampling methodology it adopts, its costs and likely results. This plan must be provided to the House and Senate Committees on Appropriations prior to commencing a full sampling project. Finally, the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes.

Ultimately, the managers believe that resolution of the long standing issues of the performance of the Department of Interior's management of Indian trusts is best worked out through a negotiation and settlement process, and not by spending millions of dollars for accountants to reconcile relatively small sums of funds over decades. ***If the sampling approach provides a reasonable basis for settlement of these claims or can provide a basis for a greater level of confidence on the part of beneficiaries about the past, this investment will be useful.*** **Given the tremendous needs in Indian country for public services from education to health care, the managers will be extremely judicious in allocating funds for an historical accounting or sampling study."** Emphasis added.

On December 21, 2000, The Special Trustee for American Indians (Special Trustee), Tom Slonaker, sent a memorandum to Secretary of the Interior (Secretary) Babbitt entitled "IIM Historical Sampling Project" attaching a memorandum by the Assistant Secretary for Indian Affairs, Kevin Gover, dated the same day, to the Special Trustee titled "Results of Federal Register process to gather information on evaluating individual Indian money (IIM) accounts (**Tab 3)**."

The latter memorandum addressed the results of the Federal Register notice's public meetings and requested written comments. A total of eighty-six meetings were scheduled and over one thousand participants attended eighty of the meetings. Sixty percent of these were IIM account holders. One hundred forty-six comments were received. As stated by Gover at page 4:

"eighty-one of the respondents who wrote in, and ***an overwhelming majority of those who voiced their preferences at the public meetings, wanted to see a transaction-by transaction reconciliation in spite of the discouraging language contained in the Federal Register Notice stating that a solution was not very likely since Congress had already dismissed such a solution***." Emphasis added.

Nonetheless, Gover went on to state:

"Now that the Department has fulfilled its administrative duty, it must determine how to evaluate the reliability of past account activity through a historical accounting process....*To solve this issue, Departmental staff, Congress, and outside third-parties have all reviewed the question of how to perform a (sic) historical accounting. Each agrees that a complete transaction-by-transaction accounting for every account would cost hundreds of millions of dollars and take many years to complete. Moreover, to accomplish this task would require the Department to significantly increase its BIA staff and would require Congress to double BIA's current appropriation."* *Id., e*mphasis added.

After quoting the Conference Committee language, referenced above, limiting the proposed statistical sampling, he stated:

"With the administrative process complete and with the above direction from Congress, it is now up to the Department to decide on a course of action. Although the majority of comments received from the Federal Register notice preferred a complete transaction-by-transaction reconciliation, ***Congress has made it clear in the above language that they are unlikely to fund such a process."*** *Id.* at 5, emphasis added.

He concluded his memorandum by stating:

"I believe that through statistical sampling, we can perform a transaction-by-transaction analysis on a statistically significant portion of the total number of accounts. **This approach is best, given the massive number of records, the complexity, and the condition of the records. Therefore, taking into consideration the entire Federal Records process, Congress' directive and the other critical needs of the Department, I believe that a sampling approach represents the best alternative to meeting our goals under the 1994 American Indian Trust Fund Management Reform Act."** *Id.*, emphasis added**.**

Special Trustee Slonaker addressed the outline of a sampling project in his memorandum to the Secretary. He stated that the memorandum reflected the conclusions reached at a meeting on August 2, 2000 after consideration of the Federal Records Notice meetings and responses. Those in attendance besides the Special Trustee were Anne Shields, Chief of Staff to Secretary Babbitt; Keving Gover, Assistant Secretary for Indian Affairs; John Berry, Assistant Secretary for Policy, Management and Budget; his deputy, Bob Lamb; Tom Thompson, Deputy Special Trustee; Tim Elliot and Edith Blackwell of the Office of the Solicitor; and Tom Gernhofer of the Office of PMB.

The Project, as it was called, would be limited to determining the accuracy of IIM accounts for the period 1952 to 1993. He further stated that he would make a determination during the process of whether an initial study "of a more limited scope in time and/or methodology (a 'pilot') may provide sufficient information to determine the efficacy of the sampling project...." *Id.* at 1. The time required for the Project was "unknown," *id.* He estimated it could take up to two years. The cost was also unknown although he gave a monetary range from $17.5 million to $70 million. In concluding, he stated at page 2:

"It is also important to understand that completion of the Project will require the allocation of adequate funds by the Department, the Office of Management and Budget, and the Congress to complete the Project timely and fully within the range of all reasonable contingencies. To the extent the funds are not in place, the Project may not be able to be pursued to completion.... ***Please note that the Congress has already indicated it will closely oversee our progress and will evaluate the sampling project plan before we can commence a full sampling project.*** **Sums in addition to the $10 million recently provided by the Congress will likely be dependent upon adequate progress and reasonable costs and benefits."** Emphasis added**.**

Secretary Babbitt's memorandum of December 29, 2000 (**Tab 4**), entitled "Statistical Sampling of Individual Indian Money Accounts," addressed the recommendations of both Slonaker and Gover stating:

"I concur with the recommendation of each that the Department should use statistical sampling instead of attempting a transaction-by-transaction historical reconciliation of all IIM accounts. In addition, Congress, in the Conference Report accompanying the Department's FY 2001 Appropriation, in which approximately ten million dollars was appropriated for this purpose, ***agreed that some form of sampling is the most cost effective approach to provide an accounting for IIM beneficiaries."*** Emphasis added.

C. Review of DOI Internal Documents, Management Interviews, and Analysis

The public and DOI executive level documents served as a basis for determining the status and scope of the DOI response to this Court's December 1999 ruling on an historical accounting. The following discussion addresses in as chronological order as possible the process used by the Interior defendants to come to the December 2000 decision on an historical accounting. It also addresses the issues raised by these document reviews and management interviews. Initial questions raised by the above-cited documents are briefly addressed here.

If the April 3, 2000 Federal Register notice's information-gathering process was the genesis for the Special Trustee's and Assistant Secretary of Indian Affairs' recommendations and the December 29, 2000 decision by Secretary Babbitt to approve their recommendations to do a statistical sampling, what sources were consulted other than the Indian account holders to come to the conclusion that statistical sampling was the best approach?

Was any form of a transactional record accounting even considered in response to the overwhelming position of the Indian Trust beneficiaries that they preferred a transaction-by-transaction accounting of their historical accounts and not a statistical sampling? For that matter, had the Federal Register notice's information gathering process been completed before the August 2, 2000 decision meeting?

Also, if the decision to do a statistical sampling for an historical accounting was based on the Federal Register notice meeting results but was not conclusively made by Secretary Babbitt until December 29, 2000 following a review of the results of those meetings, how could that December decision have been "announced by DOI" to Congress sometime before the Conference Committee approved the emergency appropriation for $10 million in September 2000?

And who were the "outside third parties" that Assistant Secretary Gover spoke of in his December 2000 memorandum who reviewed the historical accounting question after learning of the IIM account holders' preference? And who agreed that a transaction-by-transaction accounting would cost hundreds of millions of dollars and take years to complete?

Finally, if the appropriations process for a statistical sampling project (indicating a decision to do a statistical sampling historical accounting) started some time before the Federal Register notice's meeting process was completed, what was the purpose of the Federal Register's notice and the subsequent meetings to consult with the IIM account holders?

l. Federal Register Notice and Statistical Sampling Project

An initial question addressing the potential purpose of the Federal Register notice was brought to the attention of this Court by the plaintiffs in their opposition to the Interior defendants' request to this court to publish the notice in March 2000. In a deposition taken on March 13, 2000 of Thomas M. Thompson, Acting Special Trustee, Thompson was asked about the Federal Register rulemaking notice under consideration for publishing by this court. The colloquy is as follows at pages 16-17:

Q Mr. Thompson, are you aware of the proposed rulemaking to determine what - I guess what an accounting is that the Interior is proposing to do?

A Generally, I am aware of it, yes.

Q When is the first time you heard of that rulemaking process, proposed rulemaking process?

A Probably in the middle of January.

Q So the first time you heard of it was after the court's December 21, 1999, opinion?

A Yes.

Q And who did you first hear that from?

A I believe it was a meeting called by the Solicitor's Office, and probably Ed Cohen, Edith Blackwell, plus principals in other offices in the department met to discuss it.

Further, at pages 160 to 161:

Q I have a few more questions here. In January 2000 meetings, the ones that you described earlier regarding the first time you had heard of the rule-making process that was being put forth, was there any discussion regarding the *Cobell v. Babbitt*, December 21, 1999, opinion in those conversations that you heard?

A Yes

Q Could you let me know what-

A Oh, my understanding was that there was going to be an appeal filed and that in support of that appeal was going to be developed and promulgated this Federal Register notice.

Q Okay. And did you say that the decision of rulemaking was made after those meetings, and you weren't present for the actual decision?

A I think the decision had been made before.

Q Oh, before. And that's when you were on vacation?

A Yes.

Q And how did you first hear about the rule-making decision; do you recall?

A I don't recall. I don't think I heard about it until I came back from vacation around the 11th or 12th, or so, of January. And there were meetings being organized to talk about implementation of the judge's orders. And this came up in the context in the agenda for those meetings.

The Court Monitor interviewed Thompson about the Federal Register notice decision process. He recounted that the Office of the Solicitor drafted the language in the Federal Register notice. There was a debate over who would be tasked to publish it and hold the meetings required under it. Thompson, as the Acting Special Trustee, would not agree to be responsible for the notice project as he felt and stated that it was a foregone conclusion what the respondents would say - - do a transaction-by-transaction historical accounting.

In his view the Federal Register notice was not a legitimate effort to determine the means to conduct an historical accounting. He would not agree on behalf of the OST to take responsibility for the project. The outcome was obvious.

When he asked why the Solicitor's attorneys were considering this Federal Register notice process when it was evident what the outcome would be, the Solicitor's attorneys responded that it was the "price of an appeal" which would not be pursued by DOJ and, more specifically, the Solicitor General's office without DOI conducting a Federal Register rulemaking process.

Thompson's understanding of the involvement of DOJ in the DOI decision to do a Federal Register notice is confirmed to some extent by a contemporaneous note made on January 24, 2000 by Thompson's deputy, Richard Fitzgerald, and attached to a discussion draft for the outline of the Federal Register notice **(Tab 5**). He wrote:

"SOL
1 pm 1/24/2000

- ✓ **Federal Register Notice Project**
- ✓ **DOJ wants to "serve" on Court 5 days before <u>publication</u> in PR...**
- ✓ **Purpose of consultation is to request/evaluate options to "an accounting"**

<u>2 issues</u> **9:30 - 12:30p**

1. **1994 and forward...**
2. **What's an 'accounting.' "** *Id,* emphasis in original.

Thompson cautioned the Solicitor's attorneys that the Indian IIM account holders would not support this approach and, if its true purpose was revealed to the Court, DOI would be put under supervision. The Bureau of Indian Affairs (BIA) was eventually tasked to carry out those activities associated with the notice. The Assistant Secretary for Indian Affairs, Kevin Gover, took responsibility for the meetings and compiling the results.

Toward the end of February 2000, Thompson objected to his name being listed as a participant in the Federal Register notice process on the Solicitor's drafts of the notice . Ed Cohen, Deputy Solicitor, asked him for a memorandum supporting his decision. Before submitting a memorandum to Cohen, he met with Secretary Babbitt's Chief of Staff, Anne Shields to object to his office's inclusion as a signatory on the notice.

Using a draft memorandum regarding his reasons for refusing to allow the OST to be so listed, along with two pages of his handwritten notes (**Tab 6**), as a talking paper, he explained to her that, among other reasons for opposing this project, he believed it was premature. Once the process of collecting the trust records and the data contained in them was complete, DOI would be in "the best position to determine the proper method to conduct the required reconciliation." *Id.* at 1.

Further, he was "not prepared to fully support a process that did not review all available and existing data." *Id*. He also quoted from his notes that the Federal Register notice process was only being done to support the appeal and DOI had no plans beyond March 3, 2000 on what to

do about an historical accounting. Shields allowed him to withdraw his name and office from the notice.

This rendition of events surrounding the withdrawal of the OST from participation in the Federal Register notice is supported by the testimony of two of Thompson's principal deputies at the time, John Miller and the aforementioned Richard Fitzgerald. Both remember the discussions and arguments with the Solicitor's attorneys over the purpose and usefulness of the Federal Register notice. They had participated in one or more of the meetings with the Solicitor's attorneys and had expressed their own reservations.

Fitzgerald had taken contemporaneous notes of Thompson's decision not to sign the notice, which he attached to his copy of the draft of Thompson's memorandum to Shields (**Tab 7**) in which he stated:

"2/29/00 T.T. says he will not sign Fed Reg Notice -- Ed Cohen asked for a memo to support that decision -- Draft memo shared with Shields during TT's meeting with her at 5:00 PM. Final version of memo not needed." *Id.*

He also had noted his thoughts about the Federal Register notice on a February 2, 2000 discussion draft of the notice for a meeting on February 3, 2000 (**Tab 8**). He wrote in part:

"Consultation - It is passing strange that the trustee would ask the beneficiary to give the beneficiary less than complete and accurate account info." *Id.* at 1.

He wrote on the back of the last page of the draft notice:

"I would be concerned that starting an open end consultation process will be viewed as only a stalling tactic -- Only DOI is in a position to know what records can be accessed and the best method to access them under current and historic record management systems - - Lets just do it. RVP 2/3/00." *Id.* at reverse of 9.

Both men had been brought in to work in OST by Paul Homan, the first Special Trustee. Both are lawyers and Fitzgerald had been Chief Counsel to the Office of Comptroller of the Currency and, more relevant, was an experienced trust attorney; the only one within the DOI associated with trust reform. Both men had counseled Thompson to withdraw from participation in the Federal Register notice. Thompson did so and told the Secretary's Chief of Staff why.

In interviews with attorneys Tim Elliot and Edith Blackwell of the Solicitor's office who, with Ed Cohen, had supervised the Federal Register notice process, they recounted a different story. There were many projects that had to be staffed to address the Court's opinion and order. There was a need for a new High Level Implementation Plan as well as a new requirement to submit Quarterly Status Reports and four Breach reports to the Court. The Solicitor's office, having to ensure the court's orders were followed, hosted meetings to assign projects to various departments.

One of the projects they discussed was what to do about the historical accounting which, even though the Court's decision was being appealed, had to be addressed. This was not a new issue for anyone and certainly not the Solicitor's office. They had been intimately involved in the

Cobell litigation and trial. They had participated in many discussions and projects to arrive at a viable statistical-based Tribal records accounting for the Congress. The most recent discussions with DOJ prior to the Court's December 1999 decision had addressed reviving the use of experts on statistical sampling to prepare for the Phase II "accounting" trial.

The participants at the Solicitor's office meetings thought that some new approach should be tried for arriving at a decision on an historical accounting. Someone mentioned that in past litigation with the Indian gaming cases a process for determining what could be done to satisfy the needs of the parties was to put out a Federal Register notice to engender a discussion of the possibilities for whatever issue needed to be addressed.

DOI officials and the Solicitor's office reached a consensus that putting out a notice to the IIM account holders, the public, and private industry using the Federal Register might offer some guidance on what to do for an historical accounting. This discussion resulted in the plan for a Federal Register notice and was assigned for execution to Assistant Secretary for Indian Affairs Gover.

Ms. Blackwell was adamant that the decision to publish a Federal Register rule-making notice was not prompted by the litigation or in support of it except to the extent a method to do an historical accounting had to be addressed due to the Court's opinion. She did not believe it was a fruitless exercise even in light of the anticipated response from the IIM account holders as the Solicitor's office also expected to hear from private industry and other parties on methods that they may not have thought of to accomplish an accurate accounting.

Whether or not the Federal Register notice was solely to support the Interior defendants' appeal and summary judgment motions, nothing more was heard of it until the decision-making process for an historical accounting later heated up in the July to August 2000 timeframe. But before addressing the history of those meetings, other developments were taking place regarding a statistical sampling appropriation.

On June 16, 2000, Assistant Secretary John Berry, Office of PMB, sent a letter to the Director, Office of Management and Budget (**Tab 9**) transmitting an urgently needed FY 2001 budget amendment request for the DOI. At unnumbered page 3 under the heading "*Cobell* Trial Two and Federal Register Notice Costs ($16.7 million)," he states:

> **"In addition to the costs to mitigate the Court-identified breaches in FY 2001, the Department estimates a cumulative shortfall of $16.7 million for trial two litigation activities and costs for *a statistical accounting stemming from the Federal Register Notice process*."** Emphasis added**.**

He went on to state on the next page:

> **"The Department can reasonably assume that the costs to publish at least two additional Federal Register notices related to the proposed plan and a final rule will be $500,000 each. *The costs associated with carrying out the statistical sampling proposal are difficult to estimate. Consultants will likely need to be hired at an estimated cost of $9 million to develop and carry out the proposal.* The Department anticipates needing a total of $10 million in contingency funds for the Federal Register Notice costs."** Emphasis added.

Mr. Berry, who became involved in DOI's trust reform efforts at Secretary Babbitt's request after the departure in January 1999 of the first Special Trustee, identified the need for a statistical sampling or statistical accounting project stemming from the Federal Register notice with an estimated cost of $9 million.

On the same date that Berry's letter was sent to the Director, OMB, a lower ranking official in the Office of PMB sent a letter to her superior (**Tab 10**). It discussed a meeting on June 15, 2000, with DOJ attorneys and representatives of the Office of Special Trustee (OST) including the new Special Trustee, Tom Slonaker, as well as the Solicitor's office attorneys including Edith Blackwell. The issue was a study on a statistical accounting sampling method by a consultant named Wecker. The summary of the meeting states in part:

"DOJ gave a very detailed explanation of the case, the purpose of the accounting, and the various alternatives. Slonaker was primarily interested in knowing the time frame of the accounting and the cost. He wants more information on the Wecker proposal, including the expected results from the sampling.... DOJ will prepare a presentation on the Wecker proposal and go into more detail on their cost proposal and the level of risk involved (e.g., the risk that results from the Wecker sampling would not satisfy the court)."

Adding to the picture, a July 24, 2000 letter (**Tab 11**) from Bob Lamb, Deputy Assistant Secretary - Budget and Finance, Office of PMB, was sent to DOJ discussing a statistical pilot study apparently being proposed for the litigation but of interest to DOI for its possible use as a means of fulfilling their "obligations." He stated:

"At this writing it appears that the Office of Management and Budget is in the process of approving the bulk of our emergency budget amendment for Indian Trust Fund litigation support and improvements....

"As I mentioned on the phone, I see the Department's responsibility to do a (sic) **'historical accounting' on one track (ours) and litigation support and preparation of expert witness testimony on another track (yours). As we look down the track bed, these two tracks seem to converge. They may at some point or they may not.**
"We obviously will learn the strengths and weaknesses of the sampling methodology through the pilot process. That after all is the purpose of a pilot. This should help you shape *your preparation for trial and us to proceed with an accounting,* since*, at least at this junction, sampling appears to hold promise as a cost effective means of meeting our obligations*." Emphasis added.

At the same time, the DOI effort to fund a statistical accounting was moving from OMB to Congress. In an e-mail (**Tab 12**) dated July 25, 2000, from an official in PMB to a Solicitor's office attorney, Sabrina McCarthy, entitled "Revised Hill letter," forwarding the language for the letter, part of the draft letter stated:

"The Department is funding a pilot study in FY 2000 at an estimated cost of $_____. The costs associated with carrying out the statistical sampling proposal are difficult to estimate. Consultants will likely need to be hired at an estimated cost of $9 million to develop and carry out the proposal. The Department anticipates needing a total of $10 million in contingency funds for the Federal Register Notice costs."

The addition of the language concerning the "pilot study" in this letter which did not appear in the previous letter to OMB requesting funds for a "statistical sampling" may have been the result of the Special Trustee's and the Solicitor's attorneys' interest in a pilot study being proposed by DOJ for their litigation purposes but available for use by DOI for their review of the possible methods of statistical sampling. Solicitor attorneys were assigned in July to work on the pilot project and attend meetings in August concerning this Wecker study. One attorney was assigned not only to work on the pilot study but also on the Federal Register project.

The pilot project was dropped subsequently as reported in an August 24, 2000 email (**Tab 13**) from the Special Trustee to Tom Gernhofer, Office of PMB, entitled "Sampling Project." It stated in part:

"Tom, in Bob's absence I'm going to withdraw the Department's offer to fund DOJ's sampling project which we advanced recently to DOJ recently via Bob's memo.... It is no longer really "sampling" but an effort to simply establish the cost of a larger sampling project. We have a pretty good idea ourselves as to what the costs are going to be."

The Special Trustee, during his interviews, stated that he did not like the Wecker approach to statistical sampling and withdrew DOI monetary support from DOJ because of his belief that it would not lead to a viable method for an historical accounting. The reason was based on his view that the project's management and goals were not what was needed for the statistical sampling project he had been assigned to accomplish for the historical accounting. However, knowing of the concern of his deputies about the viability of the statistical sampling methodology, he still preferred to do an initial sampling or pilot project to determine the feasibility of a statistical sampling historical accounting.

Interviewees involved in the emergency request for $10 million in funding for the statistical sampling project, mainly from the Office of PMB, insist that the appropriation for an historical accounting based on the Federal Register notice was not specifically for a statistical sampling project. They explained that it was called "statistical sampling" but was for whatever the senior managers determined from the Federal Register notice meetings was the best course to pursue for an historical accounting. The appropriation language was just a "placeholder" or "plug" to provide funds for the eventual historical accounting project no matter what it turned out to be.

It is difficult to fathom how the Secretary of the Interior's representatives, over a period of months in the summer and fall of 2000, could advise not only the President's Office of Management and Budget but also the Congress that they needed an emergency appropriation of funds for a project they did not intend to pursue. Nor does the record support this contention.

If the appropriation for the statistical accounting was a placeholder for whatever they intended to do based on the results of the Federal Register notice, they went to a great deal of trouble to present a "red herring" to OMB. They needed $10 million for the Federal Register notice and a statistical sampling project associated with the Federal Register notice.

The Interior defendants appear to have been working on parallel tracks. They were carrying out a Federal Register notice process asking IIM account holders what method they preferred to use for an historical accounting while aggressively pursuing an emergency appropriation from Congress for a statistical sampling project and exploring methods with DOJ to accomplish it.

Congress appropriated the money, albeit with constraints. Whatever DOI officials told Congressional staffers, it was clear to the staffers that a statistical accounting was DOI's chosen method to accomplish the historical accounting. They were aware of this decision long before the August 2, 2000 meeting. The money requested by DOI in the spring from OMB and Congress was appropriated for statistical sampling and announced by Congress in September 2000.

Interviews with the participants in this appropriation process, including DOI officials and the Congressional Appropriation Committee staffers (Senate and House), recounted a continuing dialogue between DOI officials and Congressional appropriations staffers throughout the months before the appropriation was approved in September 2000 going back as least as far as the Spring of 2000. One OST budget official, David Gilbert, remembered first hearing of the need for a statistical sampling project appropriation as early as February or March 2000.

Statistical sampling was not a new term to the senior staff officer of the House Subcommittee on Interior and Related Agencies. He had had a continuing discussion with DOI officials on how to accomplish the Congressionally mandated accounting. The subcommittee staff had had experience with past attempts at accountings by DOI regarding the Tribal Accounts reconciliation attempt. The Conference Report (*see* **Tab 2**) spoke of that unsuccessful $20 million attempt. It reminded the DOI that Congress was aware that consultants had estimated the cost of a similar accounting for IIM account holders could range up to hundreds of millions of dollars.

DOI addressed the expense of a possible transaction-by-transaction accounting in its published Federal Register notice (**Tab 14**) warning Indian Trust account holders that:

> **"(p)ast proposals to perform IIM reconciliation have been dismissed by Indian groups and Congress as being too expensive for the limited information produced.**" *Id.* at 17525.

Or, in more inflammatory language:

> **"(m)oreover, a process that takes many years to complete will continue to consume the finite resources of the Bureau which accountholders may believe should be better expended on other programs of benefit to Indian people**." *Id*. at 17526.

If this notice language was not sufficient to persuade IIM account holders to abandon hope or any idea of a transaction-by-transaction accounting, DOI surmised that even if they persuaded it to do a transaction-by-transaction accounting the Congress would likely object:

> **"(g)iven the enormous scope and costs of an account-by-account, transaction-by-transaction reconstruction, it is unlikely to expect that the Congress would provide the Department with the staggering appropriations needed to fund such a process**." *Id.*

Confirming that the Solicitor's office attorneys, who drafted this notice, were good prophets, Congress, in approving the emergency appropriation for the historical accounting, did limit the DOI to doing a detailed plan for the sampling methodology and cautioned that:

"the determination of the use of funds for sampling or any other approach for reconciling a historical IIM accounting must be done within the limits of funds made available by the Congress for such purposes." *See* **Tab 2**, at 150.

Special Trustee Slonaker, Assistant Secretary for Indian Affairs Gover and Secretary Babbitt, in their December 2000 memoranda recommending and approving the statistical sampling project, spoke of the need to limit the project and its costs because of the Congressional concerns and directives.

But the Conference Committee Report's language referred to by the Secretary, his Special Trustee, and Assistant Secretary, in their December 2000 memoranda, authorized a Congressional appropriation for a statistical sampling. Money for this particular method of accounting was requested long before the Federal Register notice process was finished or BIA had allegedly analyzed the results. The statistical sampling appropriation process began months before the Secretary's decision on the method of accomplishing an historical accounting.

Further, confirmed in interviews with participants in the $10 million statistical sampling appropriations process, it was a DOI official, specifically, one from the Office of PMB, Bob Lamb, who wrote or at least conferred with Congressional staffers on the draft language for the Conference Committee report limiting the DOI announced statistical sampling project.

The concerned parties on the Congressional Appropriations Subcommittees and at DOI agreed in separate interviews that it was the Congressional staffers who preferred to limit the proposed statistical sampling project. All acknowledged that there was no attempt to go behind past analyses by Arthur Andersen and others of a transaction-by-transaction accounting to determine if there were other less costly methods of an accounting that held out more hope for success than the statistical sampling approach. This statistical sampling approach had failed before and Congress had so little trust in it that the Conference Committee required DOI to submit a detailed plan and seek Congressional approval before attempting it.

DOI officials took no discernable action to encourage the Conference Committee staffers or Congress to refrain from placing restrictions on the historical accounting project. DOI officials interviewed by the Court Monitor were aware to a greater or lesser degree of this Court's caution that "claims of lack of funding cannot be allowed to legally impair the United States' trustee-delegates' exacting fiduciary duties toward management of (the IIM trust)." *Cobell* at 48.

What of the Federal Register notice process? The Court Monitor interviewed the primary project officer, Jim Pace, Office of American Indian Trust, responsible for conducting the meetings with IIM account holders under the Federal Register notice's required information gathering process. Also, a review of his files was conducted.

The preparation for the meetings were rushed due to the short timeframe between the April 2000 publication of the notice and the April to May meeting dates which had not been changed from the original dates in the planned March 2000 publication. He and others working on the project as well as the participants at the meetings were not only pressed to hold meaningful meetings but wondered why they were held at all. The outcome was not in doubt.

He was not given instructions to include third party industry participants or other outsiders in the meetings. Nor was he told by Assistant Secretary Gover or his immediate supervisor (who reported to Gover) to do any analysis of the meetings' results. He was not directed to come to a decision on which of the alternatives listed in the notice would be the most complete method of accomplishing an historical accounting or whether it was practical to do something similar to what the IIM account holders preferred.

Pace had no background to do this type of analysis. He merely catalogued the participants' oral and written comments and prepared an initial draft of a memorandum summarizing the results for Assistant Secretary Gover's signature.

Pace thought the notice meeting results were to be reported in summary fashion. No DOI committee or outside group of experts met to analyze them from the standpoint of whether they could lead to the hoped-for historical accounting solution which was the basis, ostensibly, for the Federal Register notice's information-gathering process.

The only analysis or report done of the results was the Gover memorandum sent to the Special Trustee on December 21, 2000. The initial memorandum prepared by the project manager for Gover's signature was rewritten by the Solicitor's office attorneys. This occurred four months after the decision was made by the Chief of Staff to the Secretary to do a statistical accounting and over seven months after the first written communication about a statistical sampling project was sent to OMB. *See* **Tab 9.**

The Court Monitor conducted a comparison of the initial report done by the project manager and forwarded to his supervisor on August 11, 2000 (**Tab 15)** and that draft edited by a Solicitor's Office attorney, Edith Blackwell, and sent to Gover, Slonaker, Thompson, Berry and Lamb, as well as others on August 21, 2000 (**Tab 16**). As the project manager stated when interviewed, whereas his draft report was only a compilation of the written and meeting comments of the Indian Trust IIM account holders and other Indians on the method of accounting, the Solicitor's redraft, as Blackwell, in her cover note, stated:

"incorporates the Fed. Reg. Notice and the work by the procurement team (and the edits of Tom G. provided me on an earlier draft.) It also builds on the Special Trustee's memo to the Secretary. ***As I mentioned at the meeting with Anne Shields last week, I have tried to create a decisional document, which provides the rational for the decision."*** Emphasis added.

The project officer understood that the Gover memorandum was to be addressed to those DOI officials having primary responsibility for trust reform - - Slonaker and Berry - - who would then make the decision on the method for the historical accounting based on the Federal Register notice information-gathering process. He so addressed his draft. Blackwell's redraft turned the memorandum into a joint memorandum from Gover, Berry and Slonaker to the Secretary of the Interior.

After discussion of the results of the Federal Register notice process, the Blackwell memorandum added the following comments, among others, not found in the initial draft of the project manager, to wit:

"The one common thread was that all respondents wanted some form of compensation based upon a (sic) **complete of record as possible...."** *Id.* at 3.

To accomplish this task would require the Department to significantly increase BIA staff and Congress to double BIA's current appropriation. Based on informal discussions we do not believe that Congress is willing to fund a transaction-by-transaction reconciliation. Given the critical unmet educational infrastructure and economic needs of Indian people, we believe that funding a transaction-by-transaction analysis is not appropriate. We believe that using statistical sampling we can perform a transaction-by-transaction analysis on a statistically significant portion of the total number of accounts...." *Id.*

We also note that GAO and Congress have suggested sampling." *Id.* at 3-4.

The project officer heard nothing more about the Gover memorandum (nor was he asked to do any further edits) until its December 2000 publication along with the Slonaker and Babbitt memoranda.

In September 2000, the memorandum had taken on a different cast. In a draft sent from Gover to Slonaker (**Tab 17**), the memorandum, from the three same senior officials, stated in part:

"This memorandum provides you an update on *your initiative*, and mandate to our various offices, to engage in a comprehensive overhaul of the systems that manage individual Indian money and trust assets.... In addition to implementing new strategies for managing Indian trust assets, we have directed attention to the issue of whether income from individuals' trust assets was properly credited, maintained, and distributed to and from their IIM accounts in the past. Our actions with regard to this issue are outlined below. *While we believe that time and expense preclude an historical accounting of all IIM accounts*, we have some recommendations for arriving at a reliable indicator of the past management of these accounts, short of such an accounting.

"The process began on April 3, 2000 when the BIA published in the Federal Register a notice of public meetings to gather comments on the historical analysis of IIM accounts." *Id.* at 1, emphasis added.

Apparently, the project was considered at this time to have been ordered by the Secretary and was begun with the Federal Register notice to gather comments for the historical accounting required by this Court.

The final product took the form of a recommendation and included information about Congress of which Pace had no knowledge. It also became a separate memorandum with Gover addressing the results of the Federal Register notice. He sent his memorandum to Slonaker who attached it to his memorandum to Secretary Babbitt. The Special Trustee recommended that Gover's analysis and recommendation for statistical sampling be accepted as the preferred method for an historical accounting.

Interviews of the parties to this process made clear that this four month delay in the publication of the Gover and Slonaker memoranda after the August 2, 2000 meeting was caused, in part, due to DOI officials and Solicitor's attorneys' negotiations over its and the other memoranda's substance. It is evident from correspondence between the Office of Solicitor's attorneys working

on the draft memoranda and the key participants that the delay was caused because of strong disagreements between the key players about the substance and order of the memoranda.

The Special Trustee informed the Solicitor's office several weeks after the August 2, 2000 meeting that he would not agree to sign the joint memorandum that was being prepared by the Solicitor's Office attorneys because it discussed the results of the Federal Register information gathering process and made a recommendation for a statistical sampling project based on the notice process. The Office of OST had refused earlier to participate in this process due to the Acting Special Trustee's concerns from its conception about its true purpose and insufficiency. He would not now support that notice process as a foundation for the statistical sampling. The memorandum analyzing the Federal Register notice process became Gover's responsibility.

In late December 2000 to January 2001, a series of e-mails were sent between Slonaker, Thompson, Gover, and Solicitor Office attorneys Elliot and Blackwell (**Tab 18**). They held a discussion about the contents of the separate memoranda being prepared for the signatures of Slonaker, Gover and Secretary Babbitt.

On December 18, 2000, Slonaker agreed to the revised draft of the Gover memorandum but asked if Elliot and Blackwell were also satisfied, *id.* at 1. The response from Blackwell first addressed the Secretary's memorandum:

"Tim and I are not O.K. with the memo for the Secretary's signature. In addition, Tom your memo discusses the lack of funding but Congress gave us money for this project this year...." *Id.* at 1.

She then continued:

I believe that this and other problems with the Secretary's memo must be fixed and would advise the Special Trustee to update his letter to note that funding has been received. ...Edith." *Id.* at 2.

Elliot responded by stating:

"I agree with Edith's comments.... Edith, have you taken a stab at re-drafting the memorandum for the Secretary. If not, we probably should. ***I am particularly concerned that it does not mention the memorandum from Kevin, whose memo is the only one to explain why we are not following the majority of the comments received. Since the Secretary is the decision maker, his memo clearly needs to refer to the reasons for going the way Tommy Thompson suggested back in August.*****"** *Id.* at 1, emphasis added.

This dialogue had been copied to the former Acting Special Trustee and present Deputy Special Trustee, Tommy Thompson. On January 10, 2001, following his return from vacation, he replied to Elliot about his statement that he, Thompson, had made the suggestion for the statistical sampling approach now to be made a matter of Secretary of the Interior memorandum-decision by stating:

"Tim: The sense of your email, it seems to me, is that I advocated the statistical sampling approach in the August meeting. ***As I recall, my only contribution to the discussion on statistical sampling, which OST did not initiate, was to point out that a statistical sampling decision needed to be reconciled to the FR Notice, and that a proof of concept of statistical sampling, perhaps via a pilot test***

***approach, was prudent. As you probably know, given our data problems, I am skeptical that a statistical sampling of IIM accounts can be validated.* I will, of course, await the results of any pilot or test of the concept."** *Id.* at 1, emphasis added.

These e-mail's contents highlight the amount of effort that went into preparing all three memoranda to support the decision to pursue a statistical sampling project made at the meeting of the Secretary's senior staff in August 2000. They also reveal the critical need to reconcile the decision to do a statistical sampling historical accounting with the Federal Register notice meeting results, which were in favor of a transaction-by-transaction accounting. This link was of utmost concern to the Solicitor's office since the Federal Register notice and meeting process had been touted to this Court as well as the Court of Appeals as the method to begin the accounting reconciliation.

Finally, of perhaps most significance, Thompson's opposition to a Federal Register notice process as suspect due to the stated reason for its being begun in March 2000 extended to the statistical sampling project. He opposed the decision to begin a statistical sampling project when it was brought up at the August 2, 2000 meeting as a proposed decision based on the Federal Register notice process results. He did so because he did not believe it would be a viable method to meet the requirements of a court-mandated historical accounting.

Also, knowing of the initial findings regarding the results of the Federal Register notice meetings, Thompson had addressed the problem the Solicitor's attorneys then faced with the somewhat daunting prospect of reconciling the transaction-by-transaction records accounting recommendation by the overwhelming number of IIM account holders with the planned statistical sampling decision. A decision, that unbeknownst to him, had apparently been made months earlier.

How was the decision made in August to do a statistical sampling? Who was in a hurry to make the decision and why?

According to Edith Blackwell, the Solicitor's office had encouraged the August meeting due to their concern that a decision on a means to accomplish an historical accounting was taking too long. It was August, five months since the decision had been announced to this Court and the Court of Appeals about the Federal Register information-gathering process. No decision had been made based on the Federal Register notice results, which had not been tallied. She went and talked to Anne Shields. The August 2, 2000 meeting was called to discuss the historical accounting.

Anne Shields chaired the meeting. The DOI senior management attended including Berry, Slonaker, Gover, Lamb, Gernhofer, and Thompson along with Elliot and Blackwell.

In an interview with Edith Blackwell and Tim Elliot, Elliot acknowledged that there was talk at the meeting regarding the historical accounting about "anything that could be done to help the appeal." Oral argument in the Court of Appeals was scheduled for September 5, 2000.

At that oral argument, the question of timeliness was raised during the Interior defendants' argument that the reconciliation process was an administrative process and not one subject to

court review. The dialogue in the Court of Appeals transcript of the oral argument (**Tab 19)** went as follows:

The Court: How did you get from the immediate due date, which you said was prospective, to into (sic) **the reconciliation?**

I understand that the reconciliation is there and in a sense, in order to make the duties which appear to be imposed immediately make a great deal of sense, they've ultimately got to be corrected by the reconciliation, but take me through your reasoning again.

Mr. Shilton: All right, in order to do what Congress required prospectively which includes sending out statement which have accurate balances, there has to be some sort of inquiry in what happened in the past because the - -

The Court: Are you saying then that the 102(b) due date only kicks in after the reconciliation has been done?

Mr. Shilton: No. The duty to start sending out performance statements and so forth is a present duty.

The Court: And the Secretary has been fulfilling it?

Mr. Shilton: He's working towards fulfilling it. We have new systems in place which are sending out statements which include these items. There's still work to be done on those. But at some point Congress understood that you put those systems in place first, you get the data cleaned up and then you turn to the task of looking into the past, and that is covered by Section 303, which says that the special trustee shall monitor the reconciliation of IIM in tribal trust accounts to ensure a fair and accurate accounting.

Now, very important evidence about what Congress meant by that is provided in Section 304 which talks about the tribal trust .... What that indicates is that Congress expected this reconciliation process to be done administratively, overseen by the special trustee. And our point is that that means it's not something which can be done initially by the court. That interferes with the administrative - - that's supposed to be done administratively.

The Court: But we spend our lives reviewing judicially those things that are to be done first administratively. I'm not sure why you think it advances the ball any to say Congress meant for it to be done administratively, therefore the Court shouldn't have reviewed it. Then you say it is reviewable.

Mr. Shilton: ***At the end of the*** **process.**

The Court: ***When is that end?***

Mr. Shilton: ***Well, the administrative process is only recently begun, and I agree, there could be an issue as to reasonable timeliness.***

The Court: Yes. When did the statute pass requiring it?

Mr. Shilton: 1994.

The Court: What year is this?

Mr. Shilton: 2000

The Court: What do you mean by reasonably begun?

Mr. Shilton: Well, as we point out in our brief, Congress expected that the - -

The Court: What did you mean by reasonably begun?

Mr. Shilton: *April of this year.*

The Court: That duty was imposed in 1994, right?

Mr. Shilton: That's right.

The Court: You said there's not been an unreasonable delay? Judge Rogers asked you about that. Are you saying there's not been an unreasonable delay?

Mr. Shilton: I don't think so.

The Court; I realize it's not your fault, counsel. They didn't ask you to do this, but isn't it hard to defend that proposition?" *Id.* at 19-22, emphasis added.

Elliot's memory that the August 2, 2000 meeting was, in part, about supporting the appeal is possibly confirmed by this subsequent use of the reconciliation process at the appellate argument. DOJ needed to show some progress on the Federal Register process in case it was challenged at oral argument about the timeliness of DOI's retrospective accounting based on the Federal Register notice. They used as proof of that position the argument that the administrative retrospective accounting process had begun, however belatedly, with the April 2000 Federal Register notice.

The attorneys also needed a decision on the Federal Register process to show progress since April when the notice was published. Had they had the opportunity, would they have mentioned that the decision had been made to do a statistical sampling? As some evidence they would have had the opportunity presented itself, the December 2000 Secretary's decision memorandum along with the Slonaker and Gover recommendation memoranda regarding that statistical accounting decision were submitted to the Court of Appeals (and this Court) in January 2001 prior to its decision the next month.

The August 2, 2000 meeting was set to be a review of methods for making a decision on the historical accounting project. But soon after the start of the meeting Thompson was surprised to hear the issue raised of doing a statistical sampling for the historical accounting. Other than the Special Trustee and he, all parties soon agreed that a statistical sampling be pursued based not on the Federal Register notice proceedings but on a belief that statistical sampling was the only cost effective method to accomplish the historical accounting with Congress' support.

Thompson's surprise at the focus of the meeting on statistical sampling was caused by his office's prior understanding that there would be a discussion of all methods to arrive at a historical accounting decision following the Federal Register notice's meeting results. In preparation for that review, he had initiated a procurement study to address how best to involve

outside consultants in the process to advise DOI on methods to do the historical accounting. Evidence of this process, which was started by him prior to the August 2, 2000 meeting, is contained in an e-mail initiated by the procurement officer who had been assigned the project (**Tab 20**). Michael Del-Colle sent the draft "Strategic Acquisition Request" to Tom Gernhofer in the Office of PMB who forwarded it to Thompson stating:

"Forwarded is Mike Del-Colle's 'first cut' on the Plan. Please review carefully and give your suggestions directly to Mike. I think it is a very good first effort. TG."

The attached draft plan's objectives clarify Thompson's and the OST's thinking of what was to be the assumed process for making the historical accounting decision:

"ACQUISITION OBJECTIVE: to contract for the services of a third party to conduct the historical analysis of IIM accounts to determine what methodology will most reasonably and accurately establish the parameters within which adjustments can be calculated and outstanding claims resolved in the matter of COBELL v BABBITT.

ACQUISITION PLAN OBJECTIVE: to provide a general roadmap of how the Department of Interior will prepare to solicit, evaluate and select firms having the most appropriate capabilities to perform the required analysis, and to then use a process of interactive discussions and negotiations to select the solution most likely to meet the trust duties of the Secretary." *Id.* at 1.

This planned use of expert consultants to conduct the requisite research into the historical accounting methods never took place in light of the August 2, 2000 decision of the Chief of Staff to the Secretary to do a statistical sampling project.

In interviews with another participant at the August 2, 2000, meeting, Bob Lamb, a similar picture emerges. Lamb believed the meeting to be called to determine who would do the historical accounting project that was being pushed by DOJ. From his perspective of having been involved in the appropriation process for the statistical sampling project, there was never any other consideration given to how to do the accounting.

Shields, Blackwell, and most of the other attendees had been involved with statistical sampling projects and concepts even before the 1994 Act was promulgated by Congress. They had been in conferences with Congress over the years and believed that Congress would not fund an historical accounting that would consider a transaction-by-transaction accounting. Also, DOJ had been working on various means of doing statistical sampling projects to validate their own records Paragraph 19 discovery collection as well as for the Phase II trial.

There was no discussion of other options for an historical accounting or the Federal Register notice results. Nor were there any outside experts consulted. The only method the parties to this meeting were familiar with and had considered was statistical sampling. Thus, the emergency appropriation had been labeled "statistical sampling." Whether the decision to do that type of historical accounting was a conscious one taken early in 2000, or a process of doing nothing else to determine the most accurate method, the parties to the August 2, 2000 meeting were directed to do statistical sampling by the Chief of Staff, Anne Shields, based on the consensus of the majority of the participants.

The Special Trustee was directed by Anne Shields to manage the statistical sampling project. He understood that direction to come from the Secretary of the Interior. Thus, even though he and his staff had opposed the Federal Register project and had not been party to the emergency appropriation for the statistical sampling, he agreed to do it.

The participants held a discussion on who would write the memoranda necessary to link the statistical sampling decision to the Federal Register notice process. Thompson agreed to draft the Secretary's memorandum and Slonaker drafted his own. The Solicitor's office worked with Gover on his memorandum which initially became the joint memorandum which Slonaker refused to sign due to its discussion of the Federal Register notice process which the Acting Special Trustee, Thompson, had opposed and refused to be listed as a participant.

Slonaker requested a memorandum from the Secretary not only directing him to perform the project but also committing to the provision of the money and resources in staff and facilities necessary for OST to accomplish the project. Due to the disagreements over the manner of documenting the decision once it was clear the notice results were overwhelmingly in favor of a transaction-by-transaction accounting, the memoranda were not completed until December 2000. Slonaker did not get his requested memorandum from the Secretary and amended his memorandum to add his concerns about completing the project if the funds and staff were not available. *See* **Tab 3** at 2.

Another possible reason for the delay in publishing the memoranda was believed by some officials to be the ongoing settlement discussions with plaintiffs' counsel and the purported view of the Special Trustee that the historical accounting issue could be resolved through settlement as the Congress has encouraged in the Conference Committee report. Slonaker had entered into settlement negotiations over the late summer and fall of 2000. At least one DOI official believed that the Secretary had briefed the Attorney General on the likelihood of settlement.

An attorney in the Solicitor's office stated that Secretary Babbitt had given the Special Trustee carte blanche in these negotiations. Part of the Special Trustee's reasons for agreeing to do the statistical sampling project was to use it in his settlement discussions with the plaintiffs.

Everything concerning the Federal Register notice was put on hold pending the outcome of those negotiations. Also, arguments had been held before the Court of Appeals in early September and there was some reason for optimism that that court would reverse this Court's decision. Better to wait and not expend $9 million on consultants if the case either could be settled or won, eliminating the need for any accounting of the scope directed by the Court.

There is evidence in the records reviewed and statements made to the Court Monitor that the delay in making a public decision on statistical accounting was of considerable concern to all senior officials involved in the initiation and operation of the Federal Register notice process. DOJ attorneys wanted DOI officials to complete it and begin an accounting so that they could announce the decision to do the planned statistical sampling before the Court of Appeals' decision and this Court's expected inquiry into the status of the historical accounting. There were pending summary judgment motions before this Court. One, regarding a renewed argument on the behalf of the Interior defendants concerning the necessity of an historical accounting, had presented the Federal Register notice process in support of that argument.

Having used the Federal Register notice process - - the price of an appeal -- to support the litigation in the Court of Appeals, the Interior defendants now faced the possibility that its outcome, and their inability to come to a decision on how to reconcile the Secretary's decision on a statistical sampling with its results, might redound to their legal detriment.

The memoranda were finally prepared and signed in December 2000. They were filed with this Court (January 9, 2001) and with the Court of Appeals (January 8, 2001).

The Court Monitor offered the former senior policy staff including Anne Shields, John Berry, Kevin Gover and Ed Cohen an opportunity to discuss their roles in this decision-making process. Former Assistant Secretary for Indian Affairs Gover agreed to be interviewed and stated substantially the following:

He had attended the initial meetings involving these policy-makers in early 2000 to consider what actions to take in response to the Court's order. He had read the decision. The Federal Register notice process was first raised in conjunction with the need to determine the policy and procedures concerning the various issues regarding trust reform outlined in the decision. It was Gover's memory that the decision was made to use the Federal Register notice process to consult with the Indian account holders on the historical accounting as well as the policy decisions that would have to be made by DOI to carry out the Court's directive.

These meetings included, among others, John Berry, Tommy Thompson, as Acting Special Trustee, Ed Cohen, Edith Blackwell, and, at some meetings, Anne Shields and several DOJ attorneys. Gover understood that the decision to do a Federal Register notice was driven as much by the need to consult with the IIM account holders as it was to support an appeal. However, it was definitely needed for the appeal since the argument the Interior defendants planned to use, that the DOI was properly carrying out its statutory duties to provide an accounting, could not be made without some action being taken to do that accounting.

Thompson would not accept the task of conducting the Federal Register notice meetings. Gover did not remember why except that Thompson did not appear to believe it was a proper function for the OST and he had enough work as it was. Gover accepted the responsibility to conduct the meetings and compile the results.

Gover assigned the project to the Office of American Indian Trust. The dates for the meetings were not moved when the Federal Register was published in April instead of March because the meetings in some areas had already been scheduled and could not be moved. The results were not unexpected and supported a transaction-by-transaction accounting. He requested a memorandum for his signature summarizing those results that he provided to the Office of the Solicitor. They rewrote it because they did not view it as sufficient. He did not question their reasons.

He did remember meeting in August 1999 with the policy-makers and Anne Shields to consider the method to accomplish the historical accounting. They discussed a number of methods of doing the accounting. The IIM account holders' preferred method was rejected as it was an "article of faith" that Congress would never fund a transaction-by-transaction accounting. There had been past discussion with Congress over the cost of the Tribal Records reconciliation and the

expense of the five-named plaintiff discovery project. There was no sentiment for this method of accounting and the participants rejected it out of hand at the meeting. They did discuss other options but chose statistical sampling as the most cost-effective method to accomplish the project.

Thompson raised the suggestion of contracting with an outside vendor or vendors to help them determine a method to do the accounting. OST had not been receptive to the DOJ's offered statistical sampling project and believed a review by outside contractors would enable them to make a better decision.

Shields directed the Special Trustee to do the statistical sampling. The initial memorandum recommending this method to the Secretary was drafted as a joint memorandum for Slonaker's, Berry's, and his signatures. Slonaker later objected to this approach as the OST had not been involved in the Federal Register notice process and the proposed memorandum addressed it. Gover was given the memorandum prepared by the Office of Solicitor to sign which was then included with Slonaker's and sent to the Secretary.

He is certain that Secretary Babbitt was aware of this decision-making process because of a statement the Secretary later made during an Indian Working Group meeting that Gover attended with Berry and Shields. At that meeting, Secretary Babbitt commented he wanted to ensure that the statistical sampling would provide DOI assurance that the IIM account holders would receive at least what they were owed erring on the side of paying them more to prevent their getting less.

Gover was not aware of the statistical sampling appropriation process or when it had begun. His first knowledge of the appropriation process was when he read the Congressional Conference Committee report in September 1999.

Gover stated that he had concerns about whether the statistical sampling method would comply with the Court's order. The DOI was driven to this decision because it was between a rock and a hard place. On the one hand, the Court had directed an historical accounting that, to be done appropriately, would cost hundreds of millions of dollars. On the other hand, Congress had repeatedly told the DOI that they would not fund such an endeavor.

It was apparent from his interview that Gover was not a central player in the historical accounting decision-making process. He was unaware of Thompson's reasons for objecting to the Federal Register notice and the concomitant statistical sampling appropriation process. He expressed reservations about the statistical sampling decision's compliance with this Court's order but viewed it as a Secretarial-level decision that was meant to provide a potential overpayment to the IIM account holders. Nor was he intimately involved in the negotiations and rewriting` of the memoranda memorializing the decision beyond signing what he was proffered by the Office of the Solicitor.

2. Collection of Missing Information from Outside Sources - Breach Project

As part of its holding in its December 21, 1999 ruling, the Court directed the Interior defendants to take action to correct four breaches of trust. In addition to the historical accounting actions already discussed, the defendants were to:

- **"retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting"** *See Cobell at p. 58:*

- **establish written polices and procedures for: a) "collecting from outside sources missing information necessary to render an accurate accounting of the IIM trust;" b) "the retention of IIM-related trust documents necessary" for an accurate accounting; c) "computer and business systems architecture necessary" for an accurate accounting; and d) "the staffing of trust management functions necessary" for an accurate accounting."** *Id*;
- **"the Treasury Secretary owes IIM trust beneficiaries "the statutory trust duty to retain IIM trust documents" necessary for an accurate accounting."** *Id.*

One of these duties relates directly to the ability of the Interior defendants to accomplish an historical accounting. With regard to missing information, the Court stated:

"the court declares that Interior is under the duty to retrieve and retain all information regarding the IIM trust funds held in trust by the United States. This requirement, when combined with Congress's planning mandate, breaks down further into two separate trust duties. ***First, Interior must establish a written plan to retrieve missing documents necessary to render an accurate accounting.*** **Second, Interior must establish a written plan to retain IIM-related documents necessary to render an accurate accounting.** ***The missing-data problem is undoubtedly the single biggest obstacle that Interior will face in rendering an accurate accounting,*** **once its other business and computer systems are otherwise in place as provided for under the HLIP. The connection between the missing-data problem and the 'written policies and procedures' mandate is clear. An accounting , or reconciliation as is sometime used in the Trust Fund Management Reform Act, requires the gathering of necessary information and a mechanism to process that information into a form that can be reconciled with the existing funds. As the Acting Special Trustee testified, '(t)he records are the base for the entire trust operation."** *Id.* at 42-43, footnote omitted, emphasis added.

Later, in its opinion, this Court further explained the missing data project at page 48 stating:

"Although Interior has established numerous high-level plans and has acquired and begun to implement effective new accounting and asset management systems, it currently has no final written statement of policies and procedures for recovering missing data - ***as opposed to data currently retained somewhere within the bowels of Interior but not yet processed - necessary to perform an accounting."*** Emphasis added.

Clearly, the Court ordered the missing information Breach project for two reasons: 1) gather missing information from sources outside of DOI where DOI records did not include the information necessary for an accounting and; 2) the missing information was to support the historical "all funds" accounting.

Review of the public record with regard to the Interior defendants' compliance with this direction is contained in those documents supplied to the Court that address this Breach project:

In February 2000, the Court-ordered "Report on Collecting Information From Outside Sources" was published by the Interior Defendants and provided this Court. In addressing the time period covered by the proposed project in the Executive Summary at page 2 the report stated:

"Although the Order did not define the period to be covered by the directed accounting, ***the question of the scope and nature of Department's responsibility to render an accounting prior to***

October 25, 1994, the effective date of the Indian Trust Fund Management Reform Act, is under appeal. **Therefore, this document details the proposed strategies for collecting missing information to meet Interior's *statutory obligation.* The approach for providing information to account holders for the prior period will be determined after the proposed information gathering with account holders, their representatives, and other interested parties."** Emphasis added.

In March 2000, "Quarterly Report Number 1, Individual Indian Monetary Accounts" referenced the four breaches at page 4 but noted that the plans for the breaches would be provided the Court under separate cover and future Quarterly Reports would discuss implementation progress.

On May 31, 2000, the "Quarterly Status Report to the Court Number 2" was published and provided to the Court. Again, under the "Breach" project entitled "Collection of Missing Information From Outside Sources," a significant activity listed at page 24 was:

"An electronic file documenting debits and credits for IIM accounts from October 1994 to present has been prepared and is currently being analyzed by a contractor."

"Quarterly Status Report to the Court Number 3," published on August 31, 2000, repeated at page 36 the quotation above found in the original Missing Information report. It also reported at page 37 that:

'It will be feasible to assemble, using data and information existing for the most part in electronic formats, an electronic transaction history file for IIM account holders for the period October 1994 forward."

"Quarterly Status Report to the Court Number 4" again noted the limitation on the missing information effort at page 55 by stating:

"This effort is designed to : 1) describe the nature an extent of IIM trust accounts *since passage of the American Indian Trust Fund Management Reform Act of 1994; 2)* present a logical approach to assess the state of documentation, information and data available and necessary for the Department of the Interior to meet its obligations *under the Act;..."* Emphasis added.

This quarterly report mentioned that the milestone to acquire project staff and funding was scheduled to be completed by October 31, 2000 but was not met. The new milestone was March 31, 2001. Three of the six authorized positions had been filled by this report. Also, the project manager had accepted another position. Among several other milestones that were not met was a "Decision on the Methodology of Researching Missing "'Mandatory' Documents in IIM File Folders." The reason, discussed on page 56, was that the project was not properly managed. A search for a new project manager had been initiated.

"Quarterly Status Report to the Court Number 5," filed February 28, 2001, prior to the appointment of the Court Monitor, also addressed the missing information project. While discussing an expansion of the collection of missing information, the report also addressed at page 50 a pilot project that would:

"utilize data available in the historical transaction database (from October 25, 1994 forward)"

The project was now managed by a team of senior trust managers headed by the Deputy, and former Acting, Special Trustee Tommy Thompson.

In interviews held with Thompson and Ken Moyers, who worked initially on setting up the missing information project with Thompson, the question was posed why had this project been limited from the start and was as of the fifth Quarterly Report only considering missing information, whether electronic or documentary, from 1994 to the present?

Thompson stated that he and Moyers initially conceived the project to support a full accounting going back in time as far as possible. They began to draft plans for how best to locate missing documents that could not be found in the BIA documents and not just the financial management documents.

He explained that in meetings with the Office of Solicitor attorneys, they stated they did not care for his approach and wanted the project limited to 1994 forward to correspond with their appellate argument regarding the meaning of the 1994 Act. He wrote the draft as he had planned calling it an accounting project and without placing any limitation on timeframe. The Solicitor's attorneys took out his language regarding the project's support of an accounting and limited it to a 1994-forward timeframe. In their opinion, DOI had no responsibility to reconcile the historical records regarding the IIM accounts before 1994 based on the 1994 Act's language.

It should be noted that the project is still in the early stages and has missed a substantial number of milestones.

At the time of the last interview with Thompson in June 2001, it was his belief that the missing information project would be subsumed under the new accounting project directed to be accomplished by the present Secretary of the Interior and under revision to consider other options than just a statistical sampling historical accounting.

Moyers confirmed Thompson's account of the meetings with the Solicitor's office. Moyers was assigned the missing information project soon after the December 1999 court decision. They worked on it together. It was his understanding that the collection in the field of BIA transactional and financial management records and documents would be the foundation of the historical accounting. He argued for an approach using these documents to research and determine how thorough, accurate, and cost effective an accounting could be made or whether other techniques would be needed in addition to approximate the figures in an account if some key documents were missing. The only way to do an accounting was with the documents.

In a meeting with DOJ and Office of Solicitor's attorneys, he and Thompson were told that there would not be an accounting but merely a project to come up with ways to do a collection of missing documents going back to 1994. A heated debate followed over whether such a project for an accounting would ever qualify as an accounting or appropriately addressed this Court's ruling. The attorneys were adamant that the law would support their position that there was no requirement in the 1994 Act to do an historical accounting other than from 1994 forward

Following Secretary Norton's decision to do a statistical sampling project, the new project manager, Jeff Zippin, came to visit Moyers. Moyers gained the impression from Zippin that the

missing information project would become part of the statistical sampling effort rather than be used to complete missing information in the DOI files. Moyers told Zippin that he did not believe this would be sufficient for an accounting of any type with which he was familiar.

The Office of Solicitor's attorneys had a somewhat different response to the same questions. The missing information project, in their account, was set up at the time of their making the Federal Register notice decision. It was to consider only missing information from 1994 forward because whatever decision was made for a historical accounting based on the rulemaking process begun by the Federal Register notice would result in an accounting up to 1994. Thus, both periods would be addressed in compliance with the Court's order on missing documents.

There was no basis for such a limitation. While the Interior defendants had renewed their call for a reconsideration of the historical accounting following this Court's December 1999 decision in their "Motion For Partial Summary Judgment On Plaintiffs' Claims For An Historical Accounting of IIM Accounts," filed in March 2000, they had not received any relief from the Court's order to proceed with the missing information Breach project.

The only mention they made in their briefs of their position on the issue was at page 8 of their reply brief entitled "Defendants' Reply To Plaintiffs' Opposition To Defendants' First Phase II Motion For Partial Summary Judgment (Re: Plaintiffs' Claims For An Historical Accounting Of IIM Accounts). There they stated:

"Key among these actions the Court has held necessary is the development and implementation of plans to locate records necessary to provide an accurate accounting. As the Court is aware, while Interior is working on this matter, it is far from nearing completion. Assuming we correctly understand that the next trial will occur within the next year or two, *we read the Court's December 1999, opinion to contemplate a trial to determine the total amount actually being held in trust as of a relatively current date certain, rather than a review of hundreds of thousands of individual accounts."*
Footnote omitted, emphasis added.

In footnote 8 on the same page, they stated:

"These plans address collection of records necessary to provide an accurate accounting for monies currently held, and transactions occurring *since the passage of the 1994 Reform Act.* See Notice of Filing of Department of the Interior's First Quarterly Report and Related Documents, March 1, 2000, at Tab 4 ('Report on Collecting Information from Outside Sources')." Emphasis added.

This Court had not limited its decision for an "all funds" historical accounting or the missing information Breach project in support of that accounting to a 1994-forward timeframe. Nor was it asked to do so by the Interior defendants. Their limitation on the missing information project to a 1994-forward review was based solely on their interpretation of the law as argued to this Court and the Court of Appeals.

Three months after the Court of Appeals' decision affirming this Court's ruling on this issue and one and one-half years after that ruling, the Interior defendants have begun to reconsider the parameters for this Breach project laid down by this Court.

It is now expected this project will be subsumed in some manner under the review of the statistical sampling project as outlined by the Secretary's Counselor to the Court Monitor on May 15, 2001. Whether it will yet address an "all funds" accounting collection of missing information from third parties or some lesser accounting period will be the subject of the Court Monitor's continuing review and monitoring.

"Quarterly Status Report Number 6, published May 31, 2001 addressed a change to the this project at page 52 stating:

"The recent Appeals Court decision, coupled with the Department's efforts to organize a historical accounting for IIM accounts prompts reconsideration of the previous approach for assessing the historical period, from both a records acquisition and an accounting standpoint. Therefore, the Information Collection project will re reassessed in terms of strategy and approach with a view towards coupling this effort with the Department's historical accounting initiative...."

This is the only mention in the Quarterly Report of the Court of Appeals decision or the proposed actions of the Interior defendants based on that decision.

The missing information project, ordered by this Court to support the completion of an historical accounting was, from its inception, limited to a review of the methods for collecting missing information from third parties, if necessary, for the period 1994 to the present based on the appeal of the Interior defendants. It did not address itself to this Court's direction to cure the breach of trust caused, in part, by having no means for collecting missing information from third parties in light of the fact that many DOI records for periods long before 1994 were missing or had been destroyed.

3. Retention of IIM-Related Trust Documents

This Breach project was not considered by the Court Monitor as relating directly to an historical accounting as it had more to do with the prospective ability of the Interior defendants to provide accurate accountings in the future. Also, the DOI defendants, in apparent recognition of this fact combined their reporting on this Breach project with the Records Management project in Quarterly Status Report Number 2.

Finally, the project manager had not conducted his planning and implementation of this project in light of the historical accounting or missing information project. In his deposition taken on March 7, 2000, he stated the following in questioning by plaintiffs' counsel at pages 55 to 56:

Q Mr. Rossman, just for purpose of clarification since we had a short break, you are not currently physically gathering records that are for an accounting in accordance with the Court's December 21, 1999 -- is that correct? -- for the Office of the Special Trustee.

A We are not gathering records for the Office of the Special Trustee. The answer is no, we are not. We have essentially done so.

Q Do you have a plan to produce records for the accounting, the December 21, '99 accounting, in place?

A Do I have a plan? No, I don't have a plan for getting the records in place to do that. No, I do not.

Q Do you prepared (sic) **a budget to do that?**

A No, I have not.

There is a subsequent interrogation of Rossman about the planned limitation on the Missing Information project of 1994 forward and whether his records program has been so limited. In answer to a series of question regarding the Federal Register notice and the limitation on an accounting for the December 21, 1999 order he states at page 56:

A The department has a plan to have public meetings to discuss this accounting. I am aware of that. There's a program, I'm trying to look for the right word. I don't think program is the right word -- under some lawyers in Albuquerque. And I believe that organization is going to be charged with producing the accounting for '94 forward. That's my understanding at least.

Again, I'm not directly involved in that. *My job is records, not the accounting*. So I'm trying to find out everything I can find out about all of the records everywhere, figuring that that will help with this process, whatever the process itself may be. Emphasis added.

As Rossman pointed out, his job was and is records collection and in that pursuit he has built a staff and planned for collecting all DOI historical transactional and financial management records to be housed and protected in a Federal Records Repository or, as of this date, in a number of repositories.

Obviously, these records will assist DOI if it complies with this Court's order and does an historical accounting based on a review and analysis of records rather than a statistical sampling of 350 accounts initially proposed to and directed by Secretary Babbitt. The Court Monitor's review of records collection and retention consisted of visiting the Office of Trust Records, receiving briefings from Rossman and his staff, and observing how the records are being collected, stored, and processed.

The Special Master has specific authority to investigate issues dealing with record collection and retention and can better advise this Court on the status of this project. However, from the limited review of the Court Monitor, it would appear that the Office of Records Management carries out a key role with regard to trust reform and would be a significant source of information and data for a transaction-based historical accounting.

4. Secretary Norton's Statistical Sampling Decision

The United States Court of Appeals for the District of Columbia Circuit, in its February 23, 2001, decision affirming this Court's ruling, *Cobell v. Norton,* 240 F. 3d 1081 (D.C. Cir. 2001) reinforced the importance of the fiduciary duties of the Interior defendants to provide an historical accounting for the Indian Trust account holders as well as coming into compliance with the statutory mandates for providing prospective accountings by stating:

"Contrary to appellants' claims, (the 1994 Act) makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for "all funds held in trust by the United States for the benefit of

an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.... 'All funds ' means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." *Id.* at 1102 (citations omitted, emphasis in original).

And further:

"The government's broad duty to provide a *complete historical accounting* to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out." *Id.* at 1105 (emphasis added).

And finally:

"By failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, appellants breached their duties." *Id.* at 1106. .

Four days following this decision, the current Secretary of the Interior, Gale Norton, signed a memorandum (**Tab 21**) titled "Statistical Sampling of Individual Indian Money Accounts" to which she attached Secretary Babbitt's December 29, 2000 memorandum and the Gover and Slonaker memoranda of December 21, 2000. She stated:

"I concur in the directive that the Department proceed with a form of statistical sampling using a methodology which will provide the basis for an historical accounting of the IIM accounts. The purpose for this process should be to fulfill the court's directive to provide the IIM trust beneficiaries an accounting for their funds held in trust by the United States since the Act of June 24, 1938." *Id.*

On March 28, 2001, Special Trustee Slonaker testified before the House Subcommittee on Interior and Related Agencies. His prepared statement (**Tab 22**) reads in part at unnumbered page 3:

"Unfortunately, to date, efforts to reach a negotiated settlement of portions of the issues at trial in the *Cobell* case have not been successful. Interior continues to pursue a resolution of these matters. Throughout the Cobell litigation, the Department has placed a high priority on the trust reform and addressing the ongoing requests of the District Court and the Special Master."

And at unnumbered page 4, the Special Trustee discussed the statistical sampling decision:

"In late December 2000, former Secretary Babbitt directed me to proceed in planning, organizing, directing, and developing a plan to present to Congress on the feasibility of using a statistical sampling approach that may provide the basis of a historical accounting or some basis for settlement of *Cobell.* This approach was considered because of the state of trust records and the enormous costs associated with a historical accounting for each individual account. *Secretary Norton has recently reconfirmed this decision.* I am hiring a senior project manager and staff presently to begin development of this project plan." Emphasis added.

There are two questions posed by Secretary Norton's actions so soon after her assumption of her duties as Secretary of the Interior and within four days of the Court of Appeals' ruling. First,

what did she know of her subordinates' past activities regarding the process used to reach the determination that the only approach to an historical accounting could and would be a statistical sampling project, and, second, when was she informed about the status and substance of the statistical accounting? In other words, was she aware that Secretary Babbitt's decision did not comply with this Court's order nor was it in compliance with the Court of Appeals' decision just rendered.

In light of the Court of Appeals' ruling affirming this court's decision requiring an historical accounting of all accounts and all funds whenever deposited, (and related breach projects) could it have been expected that someone in The Secretary's office would have been tasked to review the past decisions made prior to the Court of Appeals holding?

Initially, these questions were put to the Secretary's Counselor, Michael Rossetti, on May 4, 2001, outlining the Court Monitor's review of the historical accounting project since February 23, 2001 and highlighting for him the apparent lack of research done on which to base a finding that statistical sampling was the best means for conducting the historical accounting. That the decision appeared to have been a "back of the envelope" determination without any research into, or requisite understanding of, what the project was meant to accomplish or what the Court had ordered. Finally, that it had been one and one-half years since this Court's December 1999 decision directing an historical accounting. There had been little or no progress except for the questionable decision to do a statistical sampling accounting and the recent hiring of a project manager.

Rossetti was asked to determine what research the Secretary had directed or her subordinates had done in preparation of her memorandum concurring in the statistical sampling project first directed by Secretary Babbitt. It was pointed out that if there had been no research or review of the foundation of Secretary Babbitt's decision or the recommendations of Slonaker and Gover, or an independent review of possible historical accounting methodology, the Secretary should consider whether her memorandum was in compliance with this Court's direction.

On May 15, 2001, Rossetti responded that the Court Monitor's comments about lack of historical accounting progress and the statistical sampling project's weaknesses had borne fruit. Rossetti indicated that the statistical sampling project would be restructured by DOI to consider all options for an historical accounting. However, the Secretary would not withdraw or change her memorandum decision on statistical sampling. The project manager, Jeff Zippin, would begin the review by hiring a statistician to consider the options available. They would then prepare a plan for Congress, which would serve as notification to this court.

Rossetti, who had only recently been assigned responsibility for trust reform, had no information on the question of what research had been directed by the Secretary prior to preparing the February 27, 2001 statistical sampling decision memorandum. The Court Monitor put this and other questions to the Secretary's Deputy Chief of Staff, Sue Ellen Wooldridge, who had been initially designated after the Secretary's appointment as the "point person" on trust reform.

In two interviews with the Court Monitor, she stated that the Secretary and she had briefings on trust reform by not only the Special Trustee but also the Department of Justice and the Office of Solicitor's attorneys. These briefings took place over a series of meetings but the main meetings

were held on February 13 and 20, 2001. These dates were confirmed by review of the briefing book provided to the Court Monitor by the Special Trustee and through interviews with him. Ii should be noted from a review of the briefing book that there was no indication that the Secretary was provided this Court's opinion.

Wooldridge had reviewed the December 2000 decision memorandum of Secretary Babbitt and the recommendation memoranda of Gover and Slonaker before meeting with the parties. She also stated she had reviewed this Court's opinion. She took note of the fact that it was over one year since the Court's order on an historical accounting before a decision was made to do any form of historical accounting. She was aware that DOJ was anxious to have some project started for the historical accounting. She inquired of the DOI officials in attendance what had been done in the past year on historical accounting and why the delay in beginning the Court-ordered project.

The most she was able to determine was that nothing had been done to begin the process other than the Federal Register notice process and a decision in August 2000 to do a statistical sampling project that was not affirmed by Secretary Babbitt until December 2000. She was aware Congress had provided funding for the statistical sampling project in September 2000. Her assumption was that the officials in charge of the decision-making process had been expecting a favorable Court of Appeals decision and were waiting for that result.

Following these meetings, and in light of the need to begin some project, she directed the Special Trustee to initiate the statistical sampling project and begin the process of hiring a project manager. She independently made the decision to proceed with the statistical sampling project and wrote the February 27, 2001 memorandum for the Secretary's signature. She did no further research. Nor did any official who was party to the previous statistical sampling decision-making process provide her with information on that process or what they viewed as the method for their statistical sampling project.

She stated that the timing of the memorandum was based not on the Court of Appeals' decision but on the need to have something showing the Secretary's proactive approach to trust reform in the record prior to her testimony before Congress on February 28, 2001. An added incentive for this memorandum was the fact that nothing had been accomplished by the previous administration in response to the Court's decision.

Although no one convinced Wooldridge to accept statistical accounting as the preferred method of an historical accounting, she was encouraged to begin some process by DOJ attorneys who were adamant that something be done because of the expected Court of Appeals opinion and the likelihood this Court would inquire about the status of the historical accounting following that decision.

While she did not delve into what was meant by Secretary Babbitt by "statistical sampling," her understanding of what she meant by the term in her memorandum was that it was a process not unlike one she had used in litigation in California regarding the assets of a bank. There, a statistical sampling project to estimate the scope of the assets involved in the litigation was conducted using a process that included not only a statistical sampling approach to fill in gaps in the hard copy records but also the review of many of the individual account holder's files. She

was unaware that the Special Trustee and other DOI officials had a different interpretation of what was comprised of the statistical sampling project approved by Secretary Babbitt.

She took responsibility for making the decision on statistical sampling and writing the memorandum for the Secretary's signature for another reason. It was her distinct impression that no one within the senior management of DOI was taking a leadership role in trust reform. This view was premised in part by the internecine warfare she had observed between OST and the BIA, and between the Solicitor's office and the OST. Included in this hostility between parties who should have been working together was the open lack of trust between DOJ and OST. All parties came to her with their grievances but none came with solutions to the trust reform management and systems problems.

Wooldridge believed she had begun a "new" statistical sampling project in an effort to show that Secretary Norton was moving forward with trust reform. However, Special Trustee Slonaker's March 2001 testimony before Congress addressed statistical sampling and the fact that Secretary Norton had "reconfirmed" this approach for the historical accounting. *See* **Tab 22** at 4.

Thus, while she may have thought she had begun a new process, there had been no apparent effort to educate the Secretary's key trust reform officer on this change of approach. It is not too surprising that the Special Trustee and others within leadership roles within DOI were confused. The Secretary's memorandum stated, "I concur in the directive that the Department proceed with a form of statistical sampling...." *See* **Tab 21**.

Publicly available articles reporting on the Secretary's testimony at her Senate Indian Affairs Committee hearing (**Tab 23**) indicate she also spoke of the statistical accounting decision she had made:

"**I have moved forward with a directive for statistical sampling so we can move forward without being slowed by the litigation."** News Summary, U.S. Department of the Interior, March 1, 2001

Referring to the Court of Appeals decision published five days before her testimony she stated:

"We take seriously the message from that decision." Press Release, Indian Trust: Cobell v. Norton, February 28, 2001.

Secretary Norton signed a memorandum directing a statistical sampling historical accounting based on a subordinate's independent decision regarding her own experience with a sampling project miniscule in comparison to the IIM account 100 plus year reconciliation. The decision was made without any research by her staff into either the decision-making process of her predecessor's subordinates or a review of the most thorough methods possible to accomplish an historical accounting.

In the context of the public record of her Department's past conduct and the publicly available information of Congress' and the courts' strong criticism of the past actions (and inaction) of DOI in bringing about mandated trust reform - - specifically an "all funds" accounting - - would it not have been prudent to take time to consider the adequacy of a decision to proceed with a limited statistical sampling approach?

The former project manager recently reported he appeared before the Secretary's Trust Reform Steering Committee composed of a number of senior level managers who played a role in the 2000 decision-making process. When he briefed them on his plans to expand the project beyond a feasibility study, he was cautioned that he was going beyond the scope of the project.

Finally, in June the House Committee on Appropriations in an appropriations bill (**Tab 24A**) stated DOI's request for an additional $7.5 million for historical accounting has been eliminated from the 2002 budget:

"The Court of Appeals recently upheld the lower Court ruling requiring an historical accounting. The Committee believes that this places additional pressure on the Government to begin some type of reconciliation process. The Committee has yet to receive the Department's report for a sampling approach, and *has not included any additional funds for an historical accounting in fiscal year 2002....*

However, the Committee has no interest in appropriating additional resources for litigation support when these resources come at the expense of on-the-ground Indian programs designed to promote the well being of the Indian and Alaska Native populations. Therefore, the Committee reiterates its position that it will not appropriate hundreds of millions of dollars for an historical accounting that provides funds for a protracted reconciliation process whose outcome is unlikely to be successful.... (T)he Congress may have to consider a legislative remedy to resolve this and other litigation related issues." *Id.* at 88, emphasis added.

The Court Monitor has interviewed the responsible officials within DOI regarding this report's language to address, specifically, what actions were taken by DOI officials with respect to, or what was known by them of, this report's language before its publication. They stated in substance the following:

On May 22, 2001, the Counselor to the Secretary, Mike Rossetti, along with other DOI officials including the Special Trustee, the Acting Assistant Secretary for Indian Affairs, the Deputy Assistant Secretary, Office of PMB, and the Deputy Commissioner for Indian Affairs were called to a meeting by the senior staff members of the House and Senate Appropriations Committees. The majority of the meeting was a discussion of the continued management disagreements between OST and BIA.

Toward the end of the meeting, the senior House staff member requested that DOI provide the Committee drafting-service support to help in the formulation of language for the House bill that would include the above-quoted text. DOI officials refused this request due to the conflict they would have in preparing language that would contravene their explicit responsibilities under both Congressional and Court directives to conduct a reconciliation of IIM accounts. The request was repeated but refused each time.

The question remains why did the House Committee senior staff member consider it necessary in light of the protestations of the DOI officials at this meeting to continue to draft the language cutting off funding for the historical accounting project and have it placed in the final House Committee report? What was done to try to convince the House staffers that this language was not only contrary to Congressional mandates to conduct an accounting but this Court and the Court of Appeals' decisions; placing DOI in the untenable position of being incapable of carrying out its statutory and court-mandated responsibilities?

Lamb provided a partial answer to these questions. When the initial statistical sampling emergency funding request was put before these same staffers in the summer of 2000, the lack of information in the request about the scope and method to accomplish the statistical sampling had been of great concern to the staffers and caused the limitations placed on the project from the start. Having not received from DOI the requested plan for the statistical sampling and being further informed at the May 22, 2001 meeting that the project might be expanded, the House senior staffer was adamant that the historical accounting project would not become another Bureau of Land Management ALMRS (computer system) $400 million loss.

DOI officials did implore the House staffers to reconsider the decision and plan to continue this summer to seek the appropriation of the historical accounting funds either in Senate Appropriations Committee negotiations or by a reprogramming request, as more funds are needed for the project.

That effort has apparently been successful to some degree. The Senate Committee on Appropriations reinstated the funding in a June 29, 2001 appropriations bill (**Tab 24B**). The Conference Committee will next consider the funding later this month.

Secretary Norton, on July 10, 2001, signed two orders with a covering memorandum (**Tab 25**). The first delegates additional authority to the Special Trustee and clarifies that he is in charge of trust reform. The second order transfers the responsibility for the historical accounting to a newly-created Office of Historical Trust Accounting. She has named a former Chief Financial Officer to the Department of State at the assistant secretary-level as Executive Director. He is charged with developing a plan for the historical accounting. She has given him 60 days to prepare a description and timetable for completion of all steps that will be needed to staff and develop the plan. He also has been given 120 days to identify to identify preliminary work that can be done in advance of completion of the plan. She has also acknowledge that the plan will consider all options, not just statistical sampling.

III. CONCLUSIONS AND DISCUSSION

There are five conclusions based on the Court Monitor's review of the Interior defendants' historical accounting decision-making process. The statement of each conclusion will be followed by a discussion detailing the reason for that conclusion.

A. There Was No Historical Accounting Project Carried Out At The Department of Interior In Compliance With This Court's December 21, 1999 Decision.

This Court spoke of agency delay in its December 21, 1999 decision:

"(T)he consequences of agency delay are great. The longer defendants delay in creating the plans necessary to render an accounting, the greater the chance that plaintiffs will never receive an actual accounting of their own trust money. For example, it is clear that the longer Interior waits to retrieve missing information, the less of that information will be available and able to be located.... As time passes the risk increases that the only available (although not necessarily legally adequate) option for Interior will be a statistical sampling method.... '(T)he interests at stake are

not merely economic interests in a license or rate structure, but personal interests in life and health.' " *Cobell* at 47 (citation omitted).

As of the date of this report, and over one and one-half years following the Court's decision directing the Interior defendants' to conduct an historical accounting, the historical accounting project remains undefined, understaffed and, with few exceptions, at the starting gate. The Collection of Missing Information From Third Parties Breach project in support of this accounting has never been in compliance with this Court's order having been based on the Interior defendants' litigation position that the collection of missing information to support the historical accounting need only be from 1994 forward.

The Secretary of the Interior's December 29, 2000 decision to conduct a statistical sampling historical accounting based allegedly on the Federal Register information-gathering process (or the Special Trustee's plan to do a possible "pilot study" of the feasibility of that sampling) was first affirmed by the present Secretary of the Interior in February 2001 and more recently has been abandoned by DOI in favor of beginning again with a still undocumented and undefined historical accounting project.

While the records retention and collection project will support a records-based accounting and is making progress, there is no present evidence that the Interior defendants will base their historical accounting project on extensive use of these documents. The previous historical accounting decision makers, including some of those personnel presently involved in deciding what new course of action to pursue, chose to disregard those documents in favor of a potential statistical sampling of 350 IIM account records.

B. The Primary Objective Of The Federal Register Notice's Information-Gathering Process Was The Support of the Interior Defendants' Appeal

The Department of Justice's "price for an appeal" for the Interior defendants was a Federal Register notice. The record speaks for itself. Both the Special Trustee and the Acting Special Trustee thought the notice process was of no value and the results preordained. The Acting Special Trustee had told the Solicitor's Office and the Chief of Staff of the Secretary of the Interior in February 2000 of his unwillingness to be associated with it because all knew the outcome and it was solely a litigation strategy to delay implementation of the Court-ordered historical accounting pending the outcome of the appeal.

The Interior defendants touted the Federal Register notice process to both this Court and the Court of Appeals as the beginning of an accounting to fulfill at least their statutory obligation and, inferentially, their obligation to begin an historical accounting as this Court had directed. It was used to argue in both briefs and oral argument to the Court of Appeals that there was no delay on the part of the Interior defendants in meeting their appropriate statutory duties to conduct an administrative process for determining the means for completing the Congressionally mandated historical accounting .

The DOJ attorneys pushed the DOI officials carrying out trust reform and the Federal Register notice process to come to a decision based on this process. They had encouraged the DOI to

begin this process as necessary to support the appeal. Failure to do so would invite Court attention and its possible decision to require much more of an historical accounting than they preferred.

The decision to do a statistical accounting, torturously linked to the Federal Register notice results by the Solicitor's Office in the December 2000 memoranda, was also provided to the Court of Appeals and to this Court in January 2001 as evidence of DOI's progress on an historical accounting.

The Federal Register notice was not a legitimate attempt to garner information as the start of a process to determine how to do an historical accounting. The true decision was to appropriate money for and conduct a limited statistical sampling project based on a small number of IIM accounts. The appropriation process was begun almost concurrently with the publication of the Federal Register notice and the beginning of the information-gathering process.

The hard truth is that the Federal Register notice was never meant to be a means for determining how to conduct the accounting based on the IIM account holders' opinions. One thousand Indians traveled countless miles to register their opinions in the consultative or information-gathering process commenced by the Federal Register notice for no reason. In the short timeframe given BIA officials to publish the notice and advertise the meetings, however conscientiously they tried, relatively few Indians heard of the meetings or attended them.

C. Secretary Babbitt's Decision On A Statistical Sampling Historical Accounting Was Not Based On The Federal Register Notice Process

As with all processes, the devil is in the details. The Interior defendants decided to pursue a statistical sampling process for the historical accounting almost simultaneously with the initiation of the publicly announced Federal Register notice process reported to this Court as a means to determine what method of record reconciliation to use.

Had the events that followed the announcement of the Federal Register notice's information-gathering process fallen into line, things might have turned out differently. If the results of the notice process were received; supported a statistical accounting; the decision then made by the Secretary of the Interior for a statistical sampling historical accounting; and the funding later acquired; all might have been in order.

However, chaos theory took hold. The results were late and tabulated even later; Congress reported that DOI had announced that it had decided to do a statistical sampling project well before the decision to do it was announced publicly; the Federal Register notice's results did not support the already-made statistical sampling decision; and there was further delay caused by debate between the Office of Solicitor's attorneys and DOI decision-makers on how to record the statistical sampling decision and reconcile the decision with the Federal Register notice results.

The upshot of the effort was a contradictory record that pointed clearly to the artifice used by the Office of Solicitor and other DOI officials to document a decision to do a statistical sampling project without reliance on a Federal Register notice process used solely to support their appeal.

D. Secretary Babbitt's Decision Was Not Supported By Any Legitimate Decision-Making Process Or Research Effort To Determine The Method To Conduct An Historical Accounting

The memoranda of Secretary of the Interior Babbitt, Assistant Secretary for Indian Affairs Gover, and Special Trustee Slonaker, were not based on any contemporary research or analysis of methods for doing an historical accounting that were uncovered by the Court Monitor. The Court Monitor's repeated requests to be shown the research on the statistical sampling decision or Federal Register notice meeting results met with references to past sampling studies and to the repeatedly stated assumption that any other method would cost too much, take too much time, and funding would not be approved by Congress.

Whether the past studies referred to would have produced a valid statistical sampling method is not the point. The Interior defendants did not do any research of means to do an accounting following the Court's December 1999 order directing an historical accounting. An attempt by the OST push for and begin such a research effort was quashed following the decision to do a statistical sampling in August 2000 by the Chief of Staff of the Secretary of the Interior.

Nor did the decision-makers convene any internal panel of experienced OST or BIA officials for a consideration of what might be able to be done. There were those officials who had taken the court's decision to heart and had ideas on how to do an accounting using the financial and transactional records that were available or that could be located or reconstituted with reasonable effort. The Acting Special Trustee and his staff had the capability to assist in this effort. They repeatedly and forcefully offered their theories and advice to no avail.

The decision, as previously discussed, had been made to do a statistical accounting almost contemporaneously with the Federal Register notice's publication. Funding was sought for it early in 2000. Congress announced the DOI's decision to do a statistical sampling in September 2000 after a four month emergency` appropriation process.

The Acting Special Trustee and his subordinates had objected to use of a Federal Register process on the grounds it was done solely for the appeal, the results were evident, and DOI knew from past court cases and the litigation what they needed to do. OST would take no part in the notice process and only agreed to carry out the statistical sampling decision once the Secretary's Chief of Staff signed off on the decision to do the statistical sampling. There is some evidence that the Special Trustee took this job under protest but accepted it because he believed the Secretary had directed it.

The Deputy Special Trustee had also told the decision-makers at the August 2, 2000 meeting that he did not believe a statistical sampling approach could be validated. Nor could DOI find a way to reconcile the results of the Federal Register notice process with this decision which flew in the face of the overwhelming choice of the IIM account holders for a transaction based accounting.

Even in light of the OST's objection and stated reasons for it made to the Office of Solicitor's attorneys and to the Chief of Staff to the Secretary of the Interior, no research was started and no experts were hired to validate this method of accounting.

The Office of the Solicitor spent the better part of four months trying to agree on, and then prepare, the decision memoranda of the Secretary of the Interior and his two senior officials responsible for trust reform within DOI and the BIA. The major problem was reconciling the Federal Register notice results with the "decision" (supposedly based on them) to do a statistical sampling historical accounting - - a singularly in-artful attempt at concealing the independent decision process for a statistical sampling approach begun months before the August 2, 2000 decision meeting.

Whether the Interior defendants were expecting to prevail in the Court of Appeals or with the ongoing settlement negotiations, they were under a duty to comply with this Court's order even while its decision was on appeal. They not only failed to do so but also took actions to avoid having to do what they were required to do by this Court with regard to the historical accounting. They neither requested a stay of their duty to comply with the order directing them to do an historical accounting pending appeal nor sought this Court's permission to postpone the historical accounting pending consideration of their motions for partial summary judgment.

E. The Present Leadership of the Department of the Interior Did Not Conduct An Adequate Review On Which To Base A Decision To Either Support The Past Secretary's Statistical Sampling Decision Or To Conduct Their Own Statistical Sampling Historical Accounting.

Secretary Norton was briefed on DOI's trust reform effort including the decision by the previous Secretary to authorize a statistical sampling historical accounting. Five days after the Special Trustee's briefing, which included a discussion of the statistical sampling project, she signed a memorandum prepared by her Deputy Chief of Staff.

The basis for the memorandum, besides these briefings received by her and the Deputy Chief of Staff, was the Deputy Chief of Staff's reading of the December 2000 decision memoranda, supposedly this Court's opinion, and her own idea of what a statistical sampling project entailed.

Secretary Norton's decision memorandum led to the confusion of most officials whom the Court Monitor interviewed about the scope of the planned statistical sampling project. Some thought it was limited to developing a plan; others thought it would be the whole project; and some wouldn't venture a guess. Even the project manager was of a different mind as to its scope than was the Special Trustee who had responsibility for the project.

The Secretary's Deputy Chief of Staff was prepared to take the blame for failing to properly order the necessary review of the past decision and the research to make the February 2001 decision. She explained the reason for the haste as needing to show Congress a proactive approach regarding trust reform on behalf of the new administration and to do it before the Secretary's testimony before Congress about trust reform. Also, she did not believe she could rely on the senior management involved in trust reform because of the unexplained one and one-half year delay and the continued disagreements between these officials over the management of trust reform.

This willingness of the Deputy Chief of Staff to accept responsibility for the lack of proper research on the statistical sampling decision does not excuse the conduct of the Interior defendants, once again, to fail to comply with a Federal Court order. Once receiving the Secretary's memorandum, neither the Office of the Solicitor nor the Special Trustee questioned the direction. Even after the Court of Appeals' opinion affirming this Court's decision on the scope of the historical accounting, no one sought to advise the Secretary of the potential problems in continuing to proceed with the historical accounting decisions made prior to or after the Court of Appeals' affirmation of this Court's decision.

Nor did the Secretary's aides question whether that Court of Appeals' opinion affected the manner in which DOI was proceeding with the historical accounting or the Breach projects. The Secretary mentioned the statistical sampling decision in her February testimony before the Senate Indian Affairs Committee the day after she signed the memorandum. She received criticism for that decision but did not order a review of the basis for it.

The Special Trustee also testified before Congress later in March that the Secretary had concurred in the statistical sampling project as Secretary Babbitt envisioned it. He did not seem to believe that her memorandum had altered the manner of conducting the project for which he had responsibility.

While one can argue that the Secretary and her staff were very busy in the early days of the new administration, too busy to consider the basis of every decision made by their subordinates, she specifically testified to the importance and high priority she placed on trust reform and noted her decision to conduct a statistical sampling project.

How long could it have taken to determine the inadequacy of the basis for the statistical sampling decision made either by the past or present administration? When the Court Monitor first questioned the decision-making process on May 4, 2001, it took only eleven days for the Secretary's office to inform him that they were taking a fresh look at the historical accounting project. Why weren't the same questions that enabled her staff to make this decision in May 2001 asked in February 2001 when they were first briefed by the Special Trustee, DOJ, and the Office of Solicitor's attorneys about trust reform and the *Cobell* litigation requirements?

The result of Secretary Norton's concurrence in Secretary Babbitt's memorandum on statistical sampling or her Deputy Chief of Staff's independent decision to do a similar project has been universal confusion and further delay in beginning the research necessary to determine just the *method* for an historical accounting. To this date, there is no documented plan for how to conduct the accounting and no projection of when it will be completed.

While the Secretary has now created an Office of Historical Trust Accounting and a new executive director has been hired to take over the historical accounting project from the Special Trustee, he has just begun his task that the Secretary has referred to as "an enormous project that will take considerable time at substantial expense." *See* **Tab 25**, Action Regarding Trust Reform and Historical Accounting memorandum, page 2 of 3. She has acknowledged that the DOI will analyze all options, not just statistical sampling. *Id.*

Also, following a meeting with DOI officials in May 2001, House Appropriations Subcommittee staffers found it necessary to introduce language into a House appropriations bill eliminating additional funding for the historical accounting project. While the Senate has now noticed that funding in its appropriation bill, the ultimate funding remains in doubt.

Not only is the method for an historical accounting and the timeframe to conduct it still unknown, the financial ability of the DOI to accomplish its fiduciary duty to provide a timely and accurate accounting to IIM trust account holders remains in doubt.

IV. REMARKS

A. The Past Administration.

This Court spoke of the recalcitrance of the Interior defendants in its December 1999 opinion, stating, "defendants have the type of historical record of recalcitrance that troubles the court," *id*. at 54. That recalcitrance, unfortunately, persisted at a high management level within DOI following the publication of this Court's opinion. This report contains many examples of that unwillingness to address the statutory mandates and Court's order directing the DOI to carry out its fiduciary duties on behalf of the IIM account holders.

A combination of desire to win the *Cobell* case coupled with a belief in the rectitude of their position on their obligations under law to the IIM account holders serve for beginning an analysis of what caused the Interior defendants to pursue the course of action addressed above in response to this Court's order directing an historical accounting.

This element of lemming-like obedience to the defense of the litigation was evident in their unwillingness to read the decision of either this Court or, most recently, the Court of Appeals to mean more than what they understood their obligation to be to the Indian trust beneficiaries. Some viewed this Court's decision as a victory; regardless of the Court's statement that "plaintiffs should take great satisfaction in the stunning victory that they have achieved today on behalf of the 300,000-plus Indian beneficiaries of the IIM trust," *id.* at 57.

Any setback caused by this Court's decisions or Justice Department pressure requiring more of them then they were prepared to accept was met with unrealistic responses and evasion. The Interior defendants viewed the legal environment to which they were exposed almost as if they were operating independently in a legal and statutory shell of their own making.

A mistaken belief that this Court would expect them to do no more than Congress would *allow* enabled them to assume what Congress would *permit* if asked. They prepared for that self-pronounced eventuality and chose to do a statistical sampling historical accounting without looking at what legitimate choices they might have within their grasp. When experienced trust managers told them that they should use the resources they had at their fingertips and consider all options based on a possible records review, they ignored the advice.

They chose the easier wrong - - finesse the court-ordered accounting with a Federal Register notice process in support of a hoped-for successful appeal and make a statistical accounting

decision -- instead of the harder right -- take the time and effort to determine all possible avenues of carrying out a legitimate historical accounting using internal and outside experts to make a thoroughly-researched decision.

Another major causal factor was the lack of leadership displayed by senior management throughout the last year and one-half. The Court Monitor asked repeatedly who made the critical decisions directing the Federal Register notice process and the statistical sampling. No one knew or would say. They were swept along by a force that had no head and not much sense.

No senior manager heard or noted the warning calls of many of the lower ranking managers and some of the most senior DOI executives that the Federal Register notice process was not a viable method to determine how to do an historical accounting. When the Chief of Staff of the Secretary of the Interior and the Solicitor's office were told of the unwillingness of the Acting Special Trustee to support the Federal Register notice and the reasons why, including that it was for no other purpose than for supporting the appeal, it was not stopped but continued unabated.

Nor was notice taken or action instituted to review the decision in August 2000 to do a statistical sampling when the senior managers were warned that the results of the Federal Register notice rulemaking process had not been properly researched and it was not a viable means for an historical accounting. Instead, there was an effort by the Solicitor's Office in concert with the these same senior managers to link the statistical sampling decision to the results of the IIM account holder meetings which had been overwhelmingly in support of a transaction-by-transaction accounting.

The Federal Register notice's information gathering process, however diligently and capably carried out by the lower ranking DOI and BIA officials in charge of it, was never meant to be used for the purposes stated in the notice. The highest-level officials within the DOI appear to have been primarily concerned with winning the *Cobell* case whatever the cost to the IIM beneficiaries. However contentious the litigation had been, it did not provide an excuse for United States government officials, including attorneys, to use their powers at the expense of those they had and have a fiduciary duty to serve.

One thousand or more Indians, sixty-some percent IIM account holders, came to DOI sponsored meetings across the nation to register their requested opinions -- "do a transaction-by-transaction accounting so we know what is in our accounts." What they didn't realize was their response had already fallen on deaf ears before it was ever recorded. All for the sake of avoiding even considering an historical accounting approach that would be something more than the type of statistical sampling that had never been shown to provide an accurate accounting reconciliation; all for the price of an appeal.

As stated by this Court's decision, "(t)his 'long and sorry' record of recalcitrance, to use defendant Babbitt's own words, is something that defendants do not even pretend to dispute.... Defendant's cry of 'trust us' is offensive to the court and insulting to plaintiffs who have that same message for over one hundred years," *id.* at 53.

There is another group of individuals besides the Indian trust beneficiaries who have been harmed in this continuing litigation-focused response by senior level DOI managers and

attorneys to this Court's decisions. In the first three months of the Court Monitor's review and monitoring activities, he has met with or spoken to more than one hundred career civil servants, Indians and non-Indians; in DOI, BIA and OST; in the field; or at Central Headquarters. They are professional, experienced, honest, and committed to doing their duty and to bringing about trust reform. They disagree with each other on much about the manner of and agency control over trust reform. They have a number of management and communication problems -- mainly caused by events, senior-level decisions, or situations beyond their control.

At times they have failed in their efforts. Their task is monumental. They face not only the day-to-day problems of doing their regular jobs but also the collateral duties associated with trust reform including the unavoidable distractions of the *Cobell* litigation. They continue to believe they face leadership, monetary, and resource limitations.

They have bent over backwards to help the Court Monitor understand their jobs and problems and have spoken candidly about the issues they have with each other, other departments, their leadership, and those with their additional duties associated with trust reform. They have received and continue to receive a constant barrage of misdirected or misinformed criticism from all quarters. This does not help their morale or self respect in the midst of their sincere efforts to carry out their responsibilities for ongoing trust operations while at the same time working on trust reform.

Therefore, it must be made clear that this report's findings, conclusions and discussion of the Interior defendants' activities regarding the historical accounting are not directed at the career civil servants within the DOI. For that matter, their experience and commitment were responsible in large part for the Court Monitor's ability to conduct a thorough review of the historical accounting decision-making process. They will be the ultimate source of successful trust reform if they receive the leadership and resources they need and deserve.

B. The Present Administration

The present administration's decisions have caused further delay in the historical accounting process. While pledging that trust reform was one of the highest priorities for the DOI, the administration did little or no research on the past administration's decision to do a statistical sampling. Their research on it and the Secretary's own statistical sampling decision was limited to briefings from those managers and attorneys involved in that past decision-making process and, allegedly, a reading of this Court's opinion. But how extensive and candid were the briefings, how concerned the listeners, and how thorough the reading of the Court's opinion and order to do an "all funds" historical accounting?

In the rush to show Congress, the IIM account holders, and the public, the new administration's commitment to trust reform in general and the historical accounting in particular, the administration failed to research the available choices for a method to do an historical accounting of over 100 years of IIM account records. Secretary Norton's decision was no more in compliance with this Court's order than Secretary Babbitt's December 2000 decision regardless of whether the same intent to evade this Court's order was present or not.

They now, presumably, have abandoned the statistical sampling approach as the sole method to conduct an historical accounting and have recently established an Office of Trust Historical Accounting to do the requisite research to properly determine the method for an historical accounting. But they must clear away the obstacles caused by both their and the past administration's decisions. That will include convincing Congress to properly fund their historical accounting project whatever it turns out to be.

While Secretary Norton and other members of her administration at DOI are new to the task of trust reform, their senior subordinates are not. The timely conduct of an historical accounting ordered by this Court over one and one-half years ago has been further delayed, in part, by this administration's reliance on those officials' representations. Continued reliance in this manner without independent verification would not augur well for the future of trust reform or this particular historical accounting project's success.

Copies of the foregoing First Report of the Court Monitor have been provided to:

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